88-80

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HOLYWELL CORPORATION and
THEODORE B. GOULD,
Petitioners

v.

FRED STANTON SMITH, Trustee of the
Miami Center Liquidating Trust, and
THE BANK OF NEW YORK,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT M. MUSSELMAN *
413 7th Street, N.E.
Charlottesville, Virginia 22901
Telephone (804) 977-4500
Attorney for Petitioner
Holywell Corporation

THEODORE B. GOULD, *pro se*
Echo Hill Farm
Garth Road
Charlottesville, Virginia 22901
Telephone (804) 295-7125

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. In a Chapter 11 Reorganization Proceeding, may the assets of a non-debtor corporation, which corporation is a separate, solvent subsidiary of a debtor parent, be confiscated by a trust created in a confirmed plan proposed by the major creditor of a debtor, in the absence of consolidation based upon evidence that the subsidary is a sham, alter ego, or of a fraudulent transfer of assets, and where the subsidiary's separate corporate identity is uncontested?

2. Since a bankruptcy court's subject matter jurisdiction is limited to property of the debtor, may such a court order that a non-debtor's property be given over to a plan-created trust, without the consent of such non-debtor (who was not before the court) and in the absence of adhering to state corporation law requiring the payment of corporate liabilities prior to issuance of a dividend to the debtor parent, and over Petitioners' objections?

3. Does the raising in its opinion of the issue of equitable estoppel on appeal *sua sponte* by the appellate (district), where no evidence was presented nor findings made thereon in the bankruptcy court below and where such issue was not specifically plead, represent an abandonment of the court's duty under Rule 52(a) of the Federal Rules of Civil Procedure and an unconstitutional denial of due process?

4. May the Court of Appeals, by affirming the district court's invocation of "equitable estoppel," sanction the taking of the private property of a solvent corporation for a private use, without consent and without consideration?

5. Did the court below err in affirming the district court's application of equitable estoppel so as to preclude Petitioner's objections that the confiscation of a non-

debtor subsidiary corporation's assets was an abuse of power and beyond the bankruptcy court's jurisdiction?

6. Did the court of appeals err in labelling as "frivolous" appellate allegations of deprivations of rights guaranteed by the Fifth Amendment to the Constitution and of actions by the court in the absence of subject matter jurisdiction over the property of non-debtors?

PARTIES TO THE PROCEEDING

Petitioners before this Court, appellants before the United States Court of Appeals for the Eleventh Circuit, are Theodore B. Gould and Holywell Corporation. The Respondents are the Bank of New York and Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust, who were the appellees below.

Pursuant to Rule 28.1, the only Petitioner which is a corporation is Holywell Corporation, which has no parent corporation and no subsidiaies or affiliates except wholly-owned subsidiaries (none of which, with the sole exception of Miami Center Corporation, were debtors in the Chapter 11 proceeding below.)

TABLE OF CONTENTS

APPENDICES are bound herewith (beginning at 1a) and contain a separate Table of Contents.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Holywell Corporation and Theodore B. Gould respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered on April 20, 1988, denying a Petition For Rehearing and Suggestion Of Rehearing In Banc upon that court's original opinion entered on March 18, 1988.

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit's order, entered April 20, 1988, is a *per curiam* denial of rehearing and rehearing in banc and is not reported. It is reprinted in the Appendix hereto ("App.") at 1a. The original opinion of the court of appeals below, entered on March 18, 1988, is reprinted at App. 3a. It is not a reported opinion.

The lower court opinions which were the subject of the review below and relevant to the Court's consideration of this Petition are also reprinted in the Appendix and, if such opinions have been reported, the citation is indicated in the Table of Contents to the Appendix.

JURISDICTION

Petitioners appealed to the Eleventh Circuit Court of Appeals from an order of the United States District Court for the Southern District of Florida, App. 5a, which affirmed a prior order of the United States Bankruptcy Court. App. 15a. The Court of Appeals, by order and opinion entered March 18, 1988, affirmed the district court's order. App. 3a. Petitioners timely filed a Suggestion of Rehearing In Banc. On April 20, 1988, the Court of Appeals entered its final order, App. 1a, denying rehearing and suggestion of rehearing in banc.

The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. Section 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The applicable provisions of the United States Constitution, the United States Code, and the Federal Rules of Civil Procedure, are set forth in the Appendix hereto at page 54a.

STATEMENT OF THE CASE

Petitioners, discharged debtors in a Chapter 11 reorganization proceeding, moved the bankruptcy court to prevent the confiscation of over $13.9 million belonging to a non-filed, solvent subsidiary of Petitioner Holywell, in the absence of consolidation and without adherence to state corporation law requiring the satisfaction of the subsidiary's corporate liabilities prior to issuance of a dividend to the parent stockholder. Although the subsidiary was not a party to the proceeding, the bankruptcy court confiscated its assets. On appeal, the district court invoked, *sua sponte*, equitable estoppel to deny Petitioners the right to object to the confiscation.

The United States Court of Appeals for the Eleventh Circuit, in its decision below, has affirmed the *sua sponte* invocation of equitable estoppel by the district court to permit that confiscation by the Respondent Trustee of the Miami Center Liquidating Trust (created post-confirmation without consent as part of a confirmed plan proposed by Respondent and major creditor Bank of New York), despite the complete lack of any attempt to show that the separate subsidiary corporation was a sham or the alter ego of its parent. The issues of the bankruptcy court's limited subject matter jurisdiction and the unconstitutional deprivation of property were summarily dismissed by the Eleventh Circuit's panel as "frivolous." The following is a brief statement of the background and pertinent underlying proceedings:

The bankruptcy proceedings from the which this petition arises relate to the construction and development of the Miami Center, a mixed-use commercial real estate project, located in downtown Miami, Florida. A Florida general partnership, Chopin Associates ("Chopin"), comprised of Petitioner Gould and Miami Center Corporation ("MCC"), a wholly owned subsidiary of Petitioner Holywell, purchased the land in 1979 and entered into a 99-year ground lease with Miami Center Limited Partnership ("MCLP"). MCLP, a Florida limited partnership whose general partners are Gould and MCC, was to construct and own the improvements. Respondent The Bank of New York ("The Bank") was the lead interim construction lender and completely controlled each disbursement and source of funds in the construction and development process.

When, in 1982, additional financing became necessary to complete the project, the Bank required that Holywell and Gould guarantee each additional loan. In addition, in an Assignment and Security Agreement dated June 23, 1983, ("the Assignment") between Holywell and The Bank, Holywell was required, as partial consideration for additional construction loans by The Bank to MCLP and Chopin, to post as additional collateral a security interest in Holywell's ownership of the stock of Twin Development Corporation and other wholly-owned subsidiaries.

Twin Development Corporation ("Twin") is a Virginia corporation, formed in 1977, which had purchased land in Arlington, Virginia, and a general partner of 1300 North 17th Street Associates ("1300"), a Virginia limited partnership which owned a leasehold interest in, and an office building on, Twin's land. Twin never pledged its assets to The Bank of New York as security for the Miami Center loans to MCLP and Chopin. Thus, while the June 23, 1983, Assignment granted the Bank a security interest in the stock of Twin, owned by Holywell, it did not grant a security interest in Twin's assets.

In 1984, MCLP, Chopin, MCC, and Petitioners Holywell and Gould filed separate petitions for relief under Chapter 11 of the United States Bankruptcy Code (11 U.S.C. Section 101 *et seq.*) in the aftermath of foreclosure actions initiated by, and disputes over the lending practices of, Respondent Bank of New York. The five separate proceedings in the United States Bankruptcy Court for the Southern District of Florida were immediately consolidated, but only for administrative purposes. Twin Development Corporation did not file such a petition and has at all times been a solvent (but for the confiscation of its assets condoned by the decisions below) and independent corporate entity.

Shortly before the filing of the Chapter 11 petitions, Twin, 1300, and certain other limited partnership entities (none of which were debtors) had entered into a contract to sell land and office buildings in the Washington, D.C. area [the "Washington Properties"] which these Selling Entities owned. The aggregate gross purchase price for the three buildings was $112,000,000. Since Petitioners Holywell and Gould had interests, as shareholders and/or partners, in these Selling Entities, Petitioners asked the bankruptcy court to authorize them to take the necessary actions as shareholders or partners, to consummate the sales contemplated by the contract. The sale itself, by the non-debtor Selling Entities, was clearly not subject to the authority of the bankruptcy court, and Holywell, by requesting permission, as Twin's stockholder, to vote for the sale, certainly did not (nor could it have if it had wanted) confer subject matter jurisdiction on the bankruptcy court over non-debtor Twin's assets.

On October 22, 1984, the bankruptcy court entered an order authorizing Petitioners to take the appropriate steps to consummate the sale of the Washington Properties by the non-debtor Selling Entities and directing that *Holywell* and *Gould* segregate the share of *net* proceeds *due Holywell and Gould* from the sale of the prop-

erties, investing those funds in accordance with Section 345 of the Bankruptcy Code and holding the funds subject to further order of the court. App. 25a. A subsequent bankruptcy court Order of December 11, 1984, directed Holywell to cause Twin to deposit into another segregated account, subject to further order of the Court, any *net* funds payable to Twin from the Washington Properties sale. App. 17a.

Finally, on December 31, 1984, the bankruptcy court entered an order which characterized the net proceeds due Holywell and Gould as "Cash Collateral," in which the Bank "appeared to have" a first lien security interest, as additional collateral for a portion of its construction loans to MCLP and Chopin. App. 21a. This "Cash Collateral Order" expressly recognized that the Selling Entities and their limited partners had their own obligations and liabilities to third parties, which would be satisfied prior to issuance of a dividend to Holywell, the partner debtor, obviously including severe income tax liabilities arising from such a substantial capital transaction. The Order stated:

> (c) Holywell provides administrative support for each of the selling entities, their partners, limited partners, and to the service companies which heretofore have been providing services to the Washington Properties. It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, their partners and limited partners are terminated and *all obligations to the Internal Revenue Service are determined and paid.* [Emphasis supplied]

The especial significance of this provision will become apparent when it is explained below how, in purported implementation of a plan of reorganization proposed and "crammed down" by the Respondent Bank without a hearing, the Respondent Trustee confiscated the entirety of Twin's share of the proceeds without any provision having been made for its substantial tax and third-party

liabilities, and on April 28, 1988, notwithstanding the prior "Cash Collateral" Order and the Trustee's possession of substantially all of the property of Holywell Corporation and its non-filed wholly-owned subsidiaries, the bankruptcy court ruled that the Trust was a "grantor trust" and the Trustee, as a "disbursing agent," was not responsible for the payment of Holywell's federal income tax liabilities incurred during the administration of the case and arising from the plan's implementation [See 26 U.S.C. Section 6012(b)(3); 26 U.S.C. Section 6151 (a); *Matter of I. J. Knight Realty Corp.*, 501 F.2d 62 (3rd Cir. 1974); and *Louisville Property Co. v. United States*, 140 F.2d 547 (6th Cir. 1944)], no provision having been made in the confirmed plan for the payment of taxes, and the plan's piecemeal dismantling could not be allowed. App. 36a.

Twin and the partnerships consummated the sale of the Washington Properties. As a result of the sales, Theodore B. Gould received a cash distribution of $4,331,-157. Holywell received a cash distribution of $12,303,869. Twin received a distribution of $13,163,490. The other non-filed entities received $3,547,000. These cash distributions were made without consideration of federal income tax liabilities related to the sale transaction. The distributions were deposited in segregated accounts in accordance with the bankruptcy court's orders. Twin retained full investment discretion over funds deposited in the segregated Twin account. Twin's funds were not used for any purpose except to make a super-priority loan (approved by the bankruptcy court) to MCLP.[1]

Each of the Debtors timely filed disclosure statements and plans of reorganization on February 15, 1985, and

---

[1] It is also significant that, after confirmation, the same bankruptcy judge who had allowed Twin's funds to be taken over by the Respondent Trustee, in disregard of Twin's separate identity, ordered that this super-priority loan must be repaid by the Trustee *to Twin*.

amended them on March 21, 1985.[2] However, the court permitted the simultaneous filing of competing plans by creditors and the Bank filed a consolidated disclosure statement and plan of reorganization on February 26, 1985, which was amended as of March 22, 1985 (the "Plan"). The Bank's Plan was further amended through a series of stipulations with the creditors' committees of the various Debtors. None of the Debtors were parties to these stipulations.

The principal elements of the Bank's Plan were as follows:

(a) Substantive consolidation of the debtors' estates (this consolidation did not extend to Twin and the other non-filed corporate subsidiaries of Holywell, but was limited to "the property of the estates of the Debtors");

(b) Creation of the Miami Center Liquidating Trust, in which the property of the debtors' estates was vested,[3]

---

[2] The plans of MCLP and Chopin provided, in pertinent part, that the real estate would be sold exclusive of any furniture, fixtures and equipment, for $260,000,000 to an unaffiliated third party and that Holywell would loan $10,000,000 to MCLP to allow MCLP to complete payment of its creditors. No loan from or confiscation of Twin's assets was either proposed or necessary.

[3] ". . . [vesting in the] Trustee . . . *all property of the estate of the Debtors* within the meaning of Section 541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors . . . to *hold, liquidate, and distribute* such Trust Property *according to the terms of this Plan* . . ."; ". . . (c) Reduce all of the Trust Property *to his possession* and *hold the same*; (d) Sell and convert the Trust Property to cash and *distribute the proceeds as specified herein*; (e) *Manage, operate*, improve, and protect the Trust Property . . . and (j) *Release*, convey or assign any right, title or interest in or about the Trust Property"; " . . . (u) Settle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them . . . ."; ". . . (w) Deal with the Trust Property or any part or parts thereof . . . as would be lawful for any person owning the same . . ." and "(x) Take no action

and appointment post-confirmation of a trustee of that trust;

(c) The Trustee's sale of the Miami Center Project to the Bank of New York or its nominee for $255.6 million, payable by cancelling the mortgage debts including accrued unmatured interest up to the closing of the sale, with the balance of the purchase price paid in cash;

(d) Taking of chattels which were *not* the property of the debtors' estates, owned by non-filed solvent affiliated creditors, and leased to the Miami Center Limited Partnership, *without consent* of the owner/lessors, without additional consideration and based upon subordination of their claims as "insiders" without provision for the cure of over $5.7 million in pre-petition rent-defaults;

(e) Subordination of the valid pre-petition claims of affiliated creditors and equity holders as "insiders," in the amount of $26,123,498 based upon classification;

(f) Dismissal with prejudice by the trustee of a civil action which the Debtors had previously filed in the United States District Court against the Bank alleging, *inter alia*, breaches of contract, breaches of fiduciary duty, fraud and usury; and

(g) Payment of the allowed claims against MCLP and the other Debtors from the cash assets of the Trust, including the cash of Holywell's non-filed corporate subsidiaries without establishing reserves for payment of their third-party corporate liabilities, including federal and state income taxes.

The Bank's Plan proposed to transfer the sales proceeds from the Washington Properties to the Trust after title to the Miami Center had been conveyed and the Bank's lien on the stock of the non-filed subsidiaries had been released. In other words, the Bank proposed to transfer the Washington Properties sales proceeds to the

---

that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions."

Trust, even though the only basis for a claim to those sales proceeds—the Bank's lien on the stock—would already have been satisfied.

Thus, while the Plan spoke of Washington Proceeds, the pre-existing "Cash Collateral" Order of December 31, 1984, had expressly required, as did state corporation law, the payment of Twin's liabilities, including federal income taxes, prior to issuing any dividend to Holywell, the debtor-shareholder.

It was also clear that there had been no consolidation of non-debtor Twin with the debtors and no attempt whatsoever to pierce Twin's "corporate veil" as a sham or alter ego. The funds owned by Twin and held in Twin's segregated account were not legally subject to being used, in the event of confirmation, to pay the pre-petition liabilities of the debtors without Twin's consent.

No provision was made in the Plan for the repayment of the court-authorized "super-priority" loans in the amount of *$4,717,404* plus accrued interest. No provision was made for the payment of federal income taxes to the Internal Revenue Service and state income taxes to the Commonwealth of Virginia, in the total estimated amount of $20,763,841.

Despite numerous objections filed by Petitioners and others to the Bank's Plan, including objections on the grounds that Petitioners and their non-filed affiliates, such as Twin, had deferred income tax liabilities related to the sale of the Washington Properties for which no reserve had been established, and that the Bank's Plan had the effect of consolidating the assets of non-filed, profitable, operating companies with those of insolvent entities, the bankruptcy court entered an order confirming the Plan on August 8, 1985 [App. 28a], without having held a confirmation hearing. A separate order appointing Fred Stanton Smith as Trustee of the Miami Center Liquidating Trust followed on August 12, 1985 [App. 33a], without having satisfied the applicable statu-

tory requirements of 11 U.S.C. Section 1104(a) and contrary to 11 U.S.C. Section 105(b).

Significantly, the confirmation order was entered without the Court ever having held the confirmation hearing mandated by 11 U.S.C. Section 1128. A *scheduled* hearing on April 29, 1985 was postponed by the bankruptcy judge and never re-convened. The only hearing held concerning the plan was limited to the proposed substantive consolidation of the *debtors'* estates, held on July 23, 1985. Thus, neither the Petitioners nor Twin nor any other party in interest was afforded an opportunity to be heard, present evidence, cross-examine witnesses, or object to the Bank's use of documents.[4]

---

[4] An appeal from the confirmation order was made to the district court (Aronovitz, J.), which remanded the case to the bankruptcy court so that the bankruptcy court could make findings of fact and enter conclusions of law. The bankruptcy court adopted *in toto* the findings of fact and conclusions of law prepared by the Bank as the prevailing party, without reviewing any physical evidence or documents or hearing testimony from witnesses upon which credibility determinations could have been based. The district court affirmed, having granted deference of the "clearly erroneous" standard in appellate review of the findings of fact and conclusions of law adopted verbatim on remand. Miami Center Limited Partnership, *et al.* v. *The Bank of New York*, 59 Bankr. 340 (Bankr. S.D. Fla. 1986). The decision of the district court was appealed to the United States Court of Appeals for the Eleventh Circuit, which dismissed the appeal on the basis of mootness, having also granted deference of the "clearly erroneous" standard for the limited purpose of reviewing the findings of fact and conclusions of law as applied to mootness. 820 F.2d 376 (11th Cir. 1987) On rehearing, the Court of Appeals vacated the district court order, directing the *district judge* to dismiss the appeal as moot. 838 F.2d 1547 (11th Cir. 1988). A petition for writ of certiorari is presently pending in this Court (No. 87-1988) related to that decision. Other appeals arising out of the bankruptcy proceedings below have been filed. For example, Miami Center Joint Venture, an affiliated creditor, has appealed the subordination of its claim, and the district court (by another judge) has *reversed* the confirmation order and remanded for further proceedings. *Olympia & York Florida Equity Corp., et al.* v. *The Bank of New York*, No. 85-3230-CIV-ATKINS. Thus, the confirmation order stands reversed even while a different dis-

Immediately after denial of the stay pending appeal, (because the Debtors could not post a $50,000,000 supersedeas bond, good only for 90 days), the Bank and the Trustee took steps to consummate the Plan. The closing of the sale of the Miami Center Project assets commenced on October 10, 1985, and ". . . the Debtors were discharged pursuant to Section 1141" [Bkrtcy., *Order On Remand*, January 29, 1986].

The Miami Center Liquidating Trust conveyed the Miami Center Project assets to the Bank's designee, and the Trustee took possession and control of the Debtors' estates. As a result of this closing, on October 10, 1985, the Bank's claim against the Debtors was satisfied, and its lien on the stock of Twin Development Corporation was extinguished. The closing, however, has never been completed. Pursuant to a "Closing Adjustment" letter issued on the same day, final settlement was adjourned for 45 days so that disputes between the Bank and the Trustee concerning various credits could be resolved. These disputes remain unresolved and have continued to prevent final settlement.

The immediate cause for events leading to this Petition involves two United States Treasury bills held by Twin. These Treasury bills, having a par value of $13,949,000—representing Twin Development's share of

---

trict judge's affirmance of the same order has been vacated by the Eleventh Circuit on the basis of its "mootness" doctrine. None of this has kept the Plan's Trustee from taking possession of assets and starting to carry out the Plan. Meanwhile, in *Holywell Telecommunications, et al.* v. *The Bank of New York*, No. 85-3431-CIV-KEHOE, Judge Kehoe recognized the separate and distinct existence of subsidiaries of Holywell Corporation and remanded that case to the bankruptcy court citing a lack of any findings to support the confiscation of their property through the plan. The bankruptcy court has subsequently adopted *in toto* the Bank of New York's proposed findings and sent the appeal back to Judge Kehoe. The Bank of New York has filed an appeal of the bankruptcy court's order authorizing immediate repayment of certain super-priority loans made by Gould, Holywell, and Twin.

the Washington Proceeds—were held in the segregated account established by Twin at the Florida National Bank in Miami pending release of the Bank's lien on Twin's stock. One bill matured March 13, 1986, with a par value of $2,200,000. The second matured on March 27, 1986, with a par value of $11,749,000. On January 21, 1986, Twin forwarded two letters—one to the Trustee, and one to John Benbow, President of Florida National Bank. The letters asserted that the Trustee did not have any authority with respect to the assets of Twin and put the Florida National Bank on notice that it was not to sell the two Treasury bills which were owned by Twin at the request of the Trustee.

On the same day, the Trustee sought to wire transfer $988,000 from the Miami Center Liquidating Trustee's checking account with Florida National Bank in order to pay a disputed claim under a settlement agreement previously approved by the bankruptcy court. In addition, checks drawn by the Trustee in the approximate amount of $385,000 were outstanding against the Trustee's checking account. Although the Miami Center Liquidating Trust had $1,133,687 in the Sun Bank, the Trustee's checking account at Florida National Bank at that time had only approximately $60,000 in funds. Since the Trustee did not transfer funds from the Sun Bank, to honor the request for a wire transfer, the Florida National Bank would have had to encash Twin's Treasury bills and move the proceeds from Twin's account to the Trustee's account. When the Florida National Bank received the January 21, 1986, correspondence from Twin, it advised the Trustee that it would not encash the Treasury bills and transfer money from the Twin account so that it could honor the Trustee's checks or comply with his request for a wire transfer.

A brief stalemate ensued. Petitioners filed an emergency motion for clarification seeking a decision from the bankruptcy court on the status of ownership of the

funds in excess of $13.9 million, including taxable interest income, held in the Twin account at Florida National Bank in Miami. This motion was filed on January 22, 1986. The Trustee responded on January 24, 1986, seeking an order that he had exclusive control and use of this account, and an order to show cause addressed to Gould asking why he should not be held in contempt.

On January 28, 1986, the bankruptcy court entered an order stating that the Trustee "was the sole and only party under the orders of this Court, to the exclusion of all others, that may direct the Florida National Bank of Miami, its officers, agents and servants to encash the United States Treasury bills in account number 0002942207, which account is in the name of Twin Development Corporation, and to distribute the proceeds of said encashment." App. 16a. The bankruptcy court denied the Trustee's application for an order to show cause why Gould should not be cited to the United States District Court for the Southern District of Florida for contempt. App. 16a.

Petitioners filed a notice of appeal from the bankruptcy court's order on February 5, 1986. On February 20, 1987, the United States District Court affirmed the bankruptcy court's order, reasoning that Holywell and Gould were *equitably estopped* from objecting to the use of the Twin assets. App. 9a. The invocation of "equitable estoppel" by the district court on appeal was *sua sponte*, estoppel not having been plead or presented below or specifically raised as an issue in the appeal. According to the district court, Petitioners had repeatedly acknowledged by "conduct and acquiescence" that Twin's share of the proceeds from the Washington Properties would be available to the Debtors' creditors. App. 10-11a. Even if Holywell and Gould did not intend to mislead the Bank, said the district court, their conduct was negligent. App. 12a. The district court further stated that the Bank had relied to its detriment on the conduct

of Gould and Holywell with respect to the use of Twin's assets. Thus, reasoned the district court, Holywell and Gould were equitably estopped from complaining about the treatment of Twin's assets. The requirements of the bankruptcy court's "Cash Collateral" Order of December 31, 1984 [App. 22a] were ignored. Issues of the lack of subject matter jurisdiction and the confiscation of private property for private use were ignored.

Petitioners filed a notice of appeal from the United States District Court's order on March 6, 1987. On March 18, 1988, the Eleventh Circuit Court of Appeals affirmed *per curiam* the district court's order, finding no error in the application of equitable estoppel and, without elucidation, stating that "Appellants' other claims on appeal are frivolous." App. 4a.

Petitioners filed a timely motion for rehearing, suggesting rehearing in banc, in which the Court of Appeals was asked to clarify whether its March 18, 1988 order indeed was intended to label as "frivolous" issues concerning the bankruptcy court's subject matter jurisdiction over the assets of non-debtors, pervasive denials of both procedural and substantive due process rights, and the illegality of a post-confirmation "trustee" with the powers of a "receiver" expressly forbidden by Section 105(b) of the Bankruptcy Code. In a *per curiam* form order of April 20, 1988, the Eleventh Circuit denied, without opinion, the petition for rehearing and Suggestion of Rehearing In Banc. App. 1a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Conflict With Previous Decisions Of This Court And Of Other Courts Of Appeal In That It Sanctions The Seizure Of Property Of A Party Not Before The Court, Without Notice Or Hearing, And Confers Unlimited Subject Matter Jurisdiction On The Bankruptcy Court.

As succinctly stated by this Court in *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437, 66 S.Ct. 247, 249, 90 L.Ed. 181 (1946):

> While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages.

There can be no clearer rule of law than that, *in the absence of consolidation*, a corporation's identity cannot be disregarded and its assets cannot be summarily applied to the obligations of others. In the absence of consolidation of the debtor estates with the non-filed affiliated corporations, it is improper to use Twin Development Corporation's assets to satisfy the debts or claims against the debtors. *Matter of Walsh Construction, Inc.*, 669 F.2d 1325 (9th Cir. 1982). *See also Matter of Sandefer*, 47 B.R. 133 (Bkrtcy. N.D. Ala. 1985); *Matter of Wm. Gluckin Company, Ltd.*, 457 F. Supp. 379 (S.D. N.Y. 1978); *In re Beck Industries, Inc.*, 479 F.2d 410 (2d Cir. 1973), *cert. den.* 414 U.S. 858 (1973).

As Twin Development Corporation's separate corporate identity has been consistently maintained and cannot be disregarded, it is axiomatic that Twin's assets cannot be treated as the assets of its stockholder. In the words of Justice Holmes, in *Klein v. Board of Tax Supervisors*, 282 U.S. 19, 24, 51 S.Ct. 15, 75 L.Ed. 140 (1930):

> [I]t leads nowhere to call a corporation a fiction. If it is a fiction, it is a fiction created by law with

> intent that it should be acted on as if true. The corporation is a person and *its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members.* [emphasis supplied]

See also *In re Beck Industries, Inc., supra,* ("Ownership of all of the outstanding stock of a corporation, however, is not the equivalent of ownership of the subsidiaries' property or assets." 479 F.2d at 415)

The Plan's Article V, *Creation of Trust,* which enumerates what shall be included in the Trust property, makes no mention whatsoever of the stock certificates of Twin Development Corporation, or the control or ownership of Twin Development Corporation as being included in the Trust Property.

Indeed, the Respondent trustee has taken an exactly consistent legal position in formal pleadings filed in the bankruptcy court. An example of that position, which does not differ from the position taken by the Petitioners herein, was stated by the trustee in his "Reply to Response of Bank of New York" filed on May 1, 1987:

> The confirmed plan did not specifically indicate what properties of the Debtors were in fact needed and essential to consummation of the Plan. There is no doubt that there are assets revested with the discharged Debtors, which property was not needed to effectuate the Plan.
>
> Had the Plan properly enumerated all of the assets of the Debtors with which the Plan dealt, the limitation of revestiture of the unneeded property would have been certain. Instead, the Plan provided for the creation of a Section 541(a) trust, without dealing with what property would revest with the order of confirmation. *At the moment of confirmation the trust was created and the undesignated and unneeded assets were revested with the Debtors.* (pp. 5-6, "Reply to Response of Bank of New York," 5-1-87, emphasis supplied)

It is clear that Twin Development Corporation has continuously existed as a distinct non-debtor corporate entity. Its shareholder continues to be Holywell Corporation, a discharged debtor, free and clear of any interest of the Miami Center Liquidating Trust, and Twin's director and President continues to be Theodore B. Gould, a discharged debtor. Twin's funds, now in the hands of the trustee, are assets of Twin Development Corporation and were never "turned over" in any way or dividended to its parent or anyone else. These established facts render the orders of the bankruptcy court and the district court below void for lack of subject matter jurisdiction.

The bankruptcy court had no jurisdiction over the assets of Twin, since such jurisdiction is expressly limited to the "property of the debtor as of the commencement of the case and of the estate." 28 U.S.C. 1334(d), *Matter of Wm. Gluckin Company, Ltd.*, 457 F. Supp. 379, 383 (S.D. N.Y. 1978), citing *Callaway v. Benton*, 336 U.S. 132, 142, 69 S.Ct. 435, 435, 441, 93 L.Ed. 553 (1949); *In re Beck Industries Inc., supra*; *In re Unishops, Inc.*, 494 F.2d 689 (2nd Cir. 1974); *Matter of Paso del Norte Oil Co.*, 755 F.2d 421 (5th Cir. 1985); *Matter of Walway*, 69 B.R. 969 (Bkcy. E.D. Mich. 1987). Subject matter jurisdiction cannot be conferred upon the Bankruptcy Court by consent or the conduct of the parties. *Matter of Paso del Norte Oil Co., supra*; *In re Texas Consumer Finance Corporation*, 480 F.2d 1261 (5th Cir. 1973).

Circuit Judge (now Eleventh Circuit Chief Judge) Roney, writing for the 5th Circuit in the 1973 case of *In re Texas Consumer Finance Corporation, supra*, announced a binding precedent for the Eleventh Circuit Court of Appeals which is analagous to the fact and procedural pattern below and should have been dispositive. In *Texas Consumer*, a bankruptcy judge was asked to order non-debtor shareholders of a debtor corporation to surrender their shares for cancellation on the basis that

their conduct and alleged promises to do so as a condition precedent to confirmation of a Plan "equitably estopped" them from refusing to do so. Judge Roney stated the issue, the case, and its holding:

> Does a Bankruptcy Court have jurisdiction in a Chapter XI proceeding to order the surrender for cancellation of the outstanding preferred stock of the bankruptcy corporation? We answer this question in the negative and reverse the order of the District Court . . . .
>
> *We find that the Referee confused his equitable powers to deal with matters and persons properly before him with his statutory jurisdiction. Id.* at 1263-1264. (emphasis added)

As to the ability to consent to or acquiesce in subject matter jurisdiction, Judge Roney wrote:

> It is the mode of procedure that is the subject of consent. Jurisdiction of subject matter must be established before this question may even be raised, and it cannot be conferred by consent, agreement or by other conduct of the parties. *See Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed. 167 (1939). *Id.* at 1266.

In the instant case, the bankruptcy court sanctioned the seizure of Twin Development Corporation's assets, for a private purpose, without notice, hearing, compensation or consent, when Twin was not a party to the bankruptcy proceedings. As this Court stated, in the words of Justice Brandeis, in *Thompson v. Consolidated Gas Company*, 300 U.S. 55 (1937):

> ". . . one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."

Such a clear violation of the substantive due process guarantees of the Constitution's Fifth Amendment are only exacerbated when accomplished by a court acting in the absence of subject matter jurisdiction. As this Court

has held, in connection with the power of a bankruptcy court,

> "Courts are constituted by authority and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, *their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal* . . . .
>
> For a court to extend the act to [unincluded] corporations . . . is to *enact* a law, not to execute one . . . ." [Emphasis supplied]

Vallely, Trustee v. Northern Fire & Marine Insurance Company, 254 U.S. 348, 353, 356 (1920), *citing Elliott v. Peirsol*, 26 U.S. (1 Pet.) 328 (1828) and *Old Wayne Mutual Life Association v. McDonough*, 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345 (1907).

The court of appeals below, in its decision, has thus engaged in "enacting law" and this Court should declare that decision, as well as the orders below, to be *nullities.*

II. The Questions Are Of A Recurring Nature And Of Vital Importance To The Business Community.

The widespread use of multi-tiered corporation, a parent company with separate subsidiary entities sharing some degree of common corporate structure, is an established norm of business.[5] When the parent company faces financial problems which cause it to seek the protection accorded by Congress in the reorganization provisions of the United States Bankruptcy Code, that protection should not become an invitation to destroy the viability of a perfectly solvent, separate subsidiary entity, based on nothing more than its affiliation with the parent debtor.

---

[5] See, e.g., *In re F. A. Potts Co., Inc.*, 23 B.R. 569, 571 (Bktcy. E.D. Pa. 1982) in which a bankruptcy court noted its "recognition of the increasingly widespread existence in the business world of parent and subsidiary corporations with interrelated corporate structures and functions."

If a creditor can (a) propose a "plan" for the parent company which purports simply to hand over to that creditor and other creditors of the parent the assets of a non-debtor, solvent subsidiary, (b) if a court can confirm that "plan" without a confirmation hearing and ignore the jurisdictional limits placed on a bankruptcy court by Congress, (c) if an appellate tribunal can ignore all these issues by *sua sponte* invoking "equitable estoppel", then the recurring chilling effect upon both parent companies and their subsidiaries is self-evident. Multifaceted businesses could not be structured in a manner appropriate to their complexity, and solvent operating companies would be loathe to protect their separate interests in an affiliate's reorganization. At the very least, such solvent affiliates and debtors would be hesitant to even discuss mutually agreeable terms of aiding in the reorganization process for fear of being estopped from complaining when the *non-debtor's* assets are confiscated.

The decision of the Eleventh Circuit Court of Appeals below has allowed all of the above to occur, in direct conflict with this Court's decisions, with those of other circuit courts of appeal, and with the jurisdictional commands of Congress. This was never a case of an attempt by creditors to allege that a subsidiary was a sham or mere alter ego, thus justifying a piercing of its corporate veil. No such allegations were ever made. Similarly, this was never a case of an attempted overt "substantive consolidation" of the non-debtor subsidiary with the debtor parent. The district court's order expressly held that there was no such consolidation [App. 13a]. The severe result of the series of decisions culminating in that of the court of appeals below is exactly the same as if such allegations had been not only made but proven.

This court should not allow this result to stand, with its significant unsettling effect on the structuring of business entities and commercial law.

III. By Affirming The Raising By The District Court Of Equitable Estoppel *Sua Sponte* On Appeal, The Court Below Has Vitiated Rules Of Procedure Promulgated By This Court And Significantly Departed From Accepted Standards Of Review.

The Eleventh Circuit Court of Appeals, in its March 18, 1988, *per curiam* affirmance, simply approved of the district court's use of the doctrine of equitable estoppel [6] and made the conclusory statement that "the record abundantly supports the district court's findings." App. 4a. What has been lost in this process, however, is the fundamental fact that the district court did not make any findings of its own based upon receiving evidence or hearing testimony and was not reviewing any such findings of the bankruptcy court as to the issue of "equitable estoppel." In effect, there was no "record" below on which equitable estoppel could be based, since it was not raised, and the bankruptcy court took no such evidence. This is a total perversion of Rule 52(a) of the Federal Rules of Civil Procedure promulgated by this Court, requiring that a court make its own considered findings of fact on a given issue, based upon admissible evidence presented to it, and state those findings specially. Anything less is "an abandonment of the duty and the trust that has been placed in the judge by these rules." *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964).

The sole basis given by the district court for its decision to affirm the bankruptcy court was the doctrine of equitable estoppel. Equitable estoppel was raised by the

---

[6] Indeed, the court of appeals' one-line description of the district court appeal betrayed a fundamental lack of understanding of the parties' positions. The Court spoke of Petitioners being "equitably estopped with respect to *their claim* to the proceeds of Twin Development Corporation's assets." As set forth in the *Statement of the Case, supra*, Petitioners *never* made a claim to those assets. They have consistently maintained that the assets belong to Twin, a separate *non-debtor* corporation, and not to the Miami Center Liquidating Trust.

district court *sua sponte*—the doctrine was not pleaded by the Bank or the Trustee, and was not invoked by the bankruptcy court. The fact that the Bank, the Trustee and the bankruptcy court never mentioned equitable estoppel comes as no surprise—there was no basis for its application here.

The district court exceeded its authority by making the *sua sponte* decision to invoke the doctrine of equitable estoppel. Under Federal Rule of Civil Procedure 8(c), estoppel is an affirmative defense which must be pleaded and proved in the court of original jurisdiction. See F.R.C.P. 8(c) ("in pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel"). A Florida appellate court applying a virtually identical Florida rule [7] has reversed as improper a trial court's *sua sponte* order invoking equitable estoppel. *Cox v. Holden*, 345 So.2d 846 (Fla. App. Dist. 1, 1973). Also highly illustrative is the recent decision of the Ninth Circuit Court of appeals in *In re Golden Plan of California, Inc.* 829 F.2d 705 (1986). Like the case at bar, the *Golden Plan* case involved an appeal from a bankruptcy court's decision, in which the district court attempted to dispose of the case on an issue (in that case, fraudulent conveyance) never considered by the court below nor specifically raised by the parties on appeal. The Ninth Circuit reversed, holding as follows:

> "The district court's *sua sponte* consideration of the fraudulent conveyance issue also rendered the proceedings procedurally defective, because the investors were denied adequate notice. The trustee's pleadings contained no allegations that the advances were fraudulent conveyances in violation of Section 548. The investors were therefore denied adequate notice and opportunity to prepare a proper defense."

---

[7] In Florida, equitable estoppel must be specifically alleged by the party seeking to rely on it as a defense. *See Department of Revenue* v. *Hobbs*, 368 So.2d 367 (Fla. App. Dist. 1 1979), *appeal dismissed without opinion*, 378 So.2d 345 (Fla. 1979); *see also Phoenix Insurance Company* v. *McQueen*, 286 So.2d 570 (Fla. App. Dist. 1 1973).

829 F.2d at 712, citing *Slone v. Abraham* (*In re Prestige Spring Corp.*), 628 F.2d 840, 842 (4th Cir. 1980).

Clearly, then, neither the Ninth Circuit nor the Fourth Circuit would have permitted the *sua sponte* consideration of a dispositive issue of equitable estoppel in the case at bar. Thus, the Eleventh Circuit's actions present a conflict among these circuits, requiring resolution by this Court.

Indeed, the District Court's decision in this case provides a perfect example of why it is dangerous for appellate courts to raise equitable estoppel *sua sponte*. When the issue has not been briefed and no evidence taken below, there is a virtual certainty that appellate courts will make mistakes in reviewing what they perceive to be "facts." In the present case, it is abundantly clear that the circumstances failed to warrant the imposition of equitable estoppel. While the patent errors in the district court's analysis were set forth in detail to the Eleventh Circuit, the examples which follow are, for purposes of this Petition, sufficient to demonstrate the magnitude of the variance from truth which occurs when courts abandon their duty to take evidence and make considered findings.

The essential elements of equitable estoppel are straightforward: (a) words, acts, conduct or acquiescence by the party to be estopped that have the effect of misrepresenting material facts; (b) such words, acts, conduct or acquiescence by the party to be estopped are willful or negligent; and (c) the other party relies in good faith on such words, acts, conduct or acquiescence, and is harmed as a result of such reliance. *See Matter of Garfinkle*, 672 F.2d 1340, 1347 (11th Cir. 1982). *See also Irvine v. Cargill Investor Services, Inc.*, 799 F.2d 1461 (11th Cir. 1986); *Highland Ins. Co. v. Trinidad & Tobago (BWIA International Airways)*, 739 F.2d 536 (11th Cir. 1984); *Travelers Indem. Co. v. Swanson*, 662 F.2d 1098 (11th Cir. 1981); *Minerals & Chemicals Philipp Corp. v. Milwhite Co.*, 414 F.2d 428 (5th Cir.

1969); *In re Sombrero Reef Club, Inc.*, 15 Bankr. 177 (Bankr. S.D. Fla. 1981).

Because equitable estoppel may bar the assertion of otherwise valid legal rights, it is not favored. The burden of proving such estoppel is placed on the party seeking to claim its protection. *Irvine v. Cargill Investor Services, Inc., supra*, 799 F.2d at 1463; *Garner v. Pearson*, 545 F. Supp. 549 (M.D. Fla. 1982); *cf. Lyng v. Payne*, 476 U.S. 926, 106 S.Ct. 2333, 90 L.Ed. 2d 921; *reh. den.* —— U.S. ——, 107 S.Ct. 11 (1986). This burden is a heavy one—the standard of proof for estoppel is clear and convincing evidence. *See Barber v. Hatch*, 380 Co.2d 536 (Fla. App. 5th Dist. 1980); *Zimeri v. Citizens and Southern International Bank of New Orleans*, 664 F.2d 952, 955 (5th Cir. 1981) (equitable estoppel must be proved with "unusual clearness"). As the Florida Supreme Court has explained in *Enstrom v. Dunning*, 186 So. 806 (1939) (quoting 21 C.J. 1139, Sec. 139):

> "Before any estoppel can be raised there must be certainty to every intent and the facts alleged to constitute it are not to be taken by argument or inference . . . . No one should be denied the right to set up the truth unless it is in plain contradiction of his former allegations or acts. If an act or admission is susceptible of two constructions, one of which is consistent with a right asserted by the party sought to be estopped, it forms no estoppel."

A review of the facts of this case in light of the elements of equitable estoppel would quickly make clear that the District Court misapplied the doctrine. Even if the Trustee or the Bank had raised the defense, the heavy burden of proof could have been satisfied to prevent Petitioners from asserting otherwise valid legal claims.

The district court misconstrued the entire basis upon which Holywell granted to the Bank of New York an Assignment and Security Interest in Twin Development Corporation's stock, misstating the record as follows:

> "On June 23, 1983, Holywell pledged, *inter alia*, Twin's stock to secure Holywell's guaranty of construction loans made to Holywell by the Bank." App. 6a.

The borrower of the subject construction loan was MCLP. Holywell was a guarantor of the recourse portion of the loans in the purported face amount of $105,586,027.03 plus accrued interest. By operation of law and the confirmed Plan's provisions, Holywell's guaranty of MCLP's construction loan was released upon the sale of the Miami Center to the Bank's designee for $255.6 million.

Despite the district court's statement to the contrary, Petitioners Holywell and Gould did not repeatedly misrepresent their position regarding the use of the Twin assets by suggesting "that the proceeds from the Washington Properties allocable to Twin would be available to creditors in satisfying claims against their estates." App. 10a. The examples provided by the district court do not support its conclusion.

The district court's first example of a purported misrepresentation, *see* App. 25a, is a statement taken from the motion by Holywell and Gould seeking approval to take the necessary steps as *partners* and *stockholders* of the Seller entities to complete the sale of the Washington Properties, arguing that the sale was in the best interest of the Debtors and their creditors because:

> the immediate cash infusion from such sale[,] *which inures to Holywell and Gould*[,] [would] provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings. App. 10a. (emphasis added).[8]

Holywell and Gould were suggesting only that their *own* funds might be useful. Nothing was said concerning assets of the solvent non-debtor Twin.

---

[8] It should be noted that the bracketed commas in this passage did not exist in the motion, and the district court has materially distorted the meaning by choosing, inexplicably, to insert them.

Debtors Holywell and Gould were to receive substantial distributions totalling *$16,635,026* from the sale of the Washington Properties, completely independent from the proceeds to be received by Twin. They believed these funds would be sufficient to pay all creditors' claims. Moreover, the Debtors were not offering to use the funds in connection with the Bank's Plan, but rather in connection with their own plans of reorganization. They never suggested that the cash could be confiscated and used by any party for any purpose, no matter whose reorganization plan was adopted.

The district court next asserted that Holywell's disclosure statement and proposed plan "made manifest to the court and creditors" that Twin's funds would be used to pay the Debtors' creditors. App. 11a. There is, however, no such statement in Holywell's plan. Holywell's plan states only that:

> "This Debtor [i.e. Holywell Corporation] . . . would make loans to Miami Center Limited Partnership, Chopin Associates and Theodore B. Gould for the sole purpose of paying the Allowed Claims of the secured and unsecured creditors of those estates . . . ." Bkcy. Ct. Docket ##337-381, 466 (Holywell plan of reorganization, p. 7).

The plans of Debtors MCLP, Chopin and Gould made consistent statements to the effect that funds necessary for the satisfaction of claims against MCLP would be derived in part from a "loan of approximately $10,000,000 in cash which *Holywell Corporation* has placed in a segregated interest bearing account." (MCC plan p. 7, Gould plan p. 8, MCLP plan p. 8). These plans further stated that "Holywell Corporation then would make loans to Miami Center Limited Partnership and Chopin Associates for the sole purpose of paying the Allowed Claims of the secured and unsecured creditors of those estates" (MCC plan p. 8, Chopin plan p. 8, MCPL plan p. 9, Gould plan p. 9). None of the Debtors' plans expressed an intent to use the *assets of Twin* for that purpose. The language of the Debtors' plans could not have been

more clear—the district court badly mischaracterized them.

The district court also cited as an "instance of express representation" that Gould "testified in bankruptcy court that Twin proceeds 'had to go to Holywell as dividends,' thus suggesting those funds would be appropriate for the satisfaction of creditors' claims." App. 10a. The district conurt misunderstood this testimony, given on February 11, 1985, in a deposition pursuant to Bankruptcy Rule 2004, and not at the hearing from which this appeal arose, as wrongly implied by the court. As the context of the testimony clearly indicates, when Gould stated that Twin assets "had to go to Holywell as dividends," he did not mean that dividending was somehow mandatory or an essential part of the Debtors' plans, but rather that a dividend was the *only way* Holywell could obtain such funds. App. 52a. That this interpretation is the correct one is supported by the fact that counsel for Gould observed immediately thereafter on the record at the deposition that Twin's proceeds had *not* been distributed as a dividend to Holywell. App. 52a.

In addition, the district court cited examples of situations in which it believed that "Gould and Holywell acquiesced in the Bank's justifiable presumption that Twin's proceeds from the Washington properties would be included within the debtor's estates." App. 12a. These allegations of misrepresentation by acquiescence have no basis in fact.

The district court begins by pointing to the orders of the bankruptcy court requiring the Washington Properties proceeds to be put in segregated accounts and treated as "cash collateral" for the Bank's mortgage lien. The district court sees acquiescence in the fact that no appeal from these orders was taken by Holywell and Gould. The district court's observation reflects a basic misunderstanding as to the nature of these orders. The bankruptcy court's orders were not final, were limited to noting that the Bank of New York *appeared* to have a first lien on the net proceeds due *Holywell and Gould*, and that this lien

remained subject to any later contest as to its validity and priority. App. 22a.

The bankruptcy court did not grant the Bank a first lien on Twin's proceeds—the Bank only had a security interest in Twin's stock as additional collateral for repayment of its pre-petition loan. The orders did not provide for the confiscation of non-debtor Twin's assets. They simply required that they be segregated so long as the Bank's mortgage lien existed. App. 19a and 23a. The plans being formulated by both the bank and the Debtors at that time contemplated a cash sale of the real estate, the release of the underlying mortgage lien, and the release of the related lien on the Twin stock. Indeed, the "Cash Collateral Order" of December 31, 1984, expressly recognized that third party liabilities, including substantial Federal income tax liabilities of Twin and other selling entities would have to be "determined and paid" out of those proceeds. App. 22a.

The manner in which Petitioners Holywell and Gould implemented the orders clearly demonstrates that they took the view that Twin's assets were separate and distinct from their assets and not to be commingled. Holywell, Gould, and Twin ensured that Twin's proceeds were kept in a separate account in the name of Twin. In September 1985, while the Bank's mortgage lien was still outstanding, Twin purchased six-month Treasury Bills in its own name with those proceeds, still keeping the funds intact and segregated.

The district court's next example of acquiescence is unfathomable. It asserts that "the appellants did not enter any objections to the Bank's Plan, and after the bankruptcy court approved the Bank's plan, they did not raise the issue presently at bar on appeal." App. 11a. But the Debtors filed many objections to the Bank's Plan.[9] (Bankruptcy Court Docket Numbers 447, 534, 580, 678, 701, 809, 838, 839, 888a.) The Debtors took the view from

[9] The bankruptcy court confirmed the plan without ever holding a hearing on the objections to the Bank's Plan.

the start that the Plan was unfair and inequitable to affiliated creditors, the Debtors, and Holywell's non-filed solvent corporate subsidiaries. The objections specifically referred to the unwarranted consolidation of the assets of solvent entities with those of insolvent entities. (e.g., Bankruptcy Docket No. 888a).

Objections to the treatment of Twin were made in the appeal from the confirmation order, despite the district court's assertion. The Debtors' brief stated as follows:

> "In addition [substantive consolidation in the Bank's Plan] has been used to control and disburse $14 million of Twin Development's assets for the benefit of the Bank's plan. Despite the fact that HLC, HTC and Twin Development are solvent companies and have not filed as debtors in the Chapter 11 proceeding, the Bankruptcy Court has taken the position that it has the authority to dispose of the assets of these companies because they are subsidiaries of Holywell and Gould is the sole stockholder of Holywell. This consolidation of non-filed entities with bankruptcy entities is particularly objectionable and contrary to law." Brief of Appellants in *Miami Center Limited Partnership, et al. v. The Bank of New York*, 59 Bankr. 340 (Bankr. S.D. Fla. 1986) at p. 37.

At various points in its order, the district court compounded its mistakes by stating that no objections were filed and that no appeal of the confirmation order was taken. App. 11a. It even goes so far as to state that Appellants failed "to appeal an order clarifying that the Twin proceeds could be used by the Liquidating Trustee" (App. 11a)—in other words, that they failed to appeal the very order that the district court was then reviewing.

Similarly, as was set forth in detail by Petitioners to the Eleventh Circuit, the district court purported to "find" non-existent or distorted "facts" on the elements of the "misleading of the Bank" and the Bank's "reliance to its detriment" App. 12a. To suggest the existence of these elements of equitable estoppel is, indeed, patently

absurd on its face in a situation where the Respondent Bank proposes and pushes through, by "cram down" a plan whereby it has its hand-picked "trustee" immediately sell it the Miami Center property and dismiss the Petitioners' Federal Civil Action.

The Court of Appeals refers to a "record" which was never made to support the imposition of a doctrine never plead. Rules 52a and 8c, as promulgated by this court have been effectively nullified. It is respectfully submitted by Petitioners that, in cases such as this, the departure from the accepted standards of review requires the exercise of this Court's supervisory power. *See e.g. Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed. 2d 630 (1974); *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 69 S.Ct. 535, 93 L.Ed. 672 ((1949), *aff'd on rehearing*, 339 U.S. 605, 70 S.Ct. 854, 94 L.Ed. 1097 (1950).

CONCLUSION

For all the foregoing reasons, the questions presented to this Court by the Petitioners are of such a special and important nature to warrant the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

ROBERT M. MUSSELMAN *
413 7th Street, N.E.
Charlottesville, Virginia 22901
Telephone (804) 977-4500
Attorney for Petitioner
Holywell Corporation

THEODORE B. GOULD, *pro se*
Echo Hill Farm
Garth Road
Charlottesville, Virginia 22901
Telephone (804) 295-7125

* Counsel of Record

APPENDICES

TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5195

IN RE: HOLYWELL CORPORATION and
THEODORE B. GOULD,
Debtors.

HOLYWELL CORPORATION and THEODORE B. GOULD,
Plaintiffs-Appellants,

versus

FRED STANTON SMITH, Liquidating Trustee,
and BANK OF NEW YORK,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion ————, 11 Cir., 198—, —— F.2d ——)

[Filed April 20, 1988]

Before VANCE and ANDERSON, *Circuit Judges*, and *BROWN, *Senior Judge.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Anderson
United States Circuit Judge

---

* Senior Judge for the Fifth Circuit Court of Appeals, sitting by designation.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5195

D.C. Docket No. 86-0848
IN RE: HOLYWELL CORPORATION and THEODORE B. GOULD,
Debtors.

HOLYWELL CORPORATION and THEODORE B. GOULD,
Plaintiffs-Appellants,

versus

FRED STANTON SMITH, Liquidating Trustee, and
BANK OF NEW YORK,
Defendants-Appelleess.

Appeal from the United States District Court
for the Southern District of Florida

(March 18, 1988)

Before VANCE and ANDERSON, Circuit Judges, and BROWN *, Senior Circuit Judge.

---

* Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

PER CURIAM:

The district court found that appellants were equitably estopped with respect to their claim to the proceeds of Twin Development Corporation's assets. We find no error in the district court's analysis, and the record abundantly supports the district court's findings. Appellants' other claims on appeal are frivolous.

AFFIRMED.[1]

---

[1] The motion of appellee, Bank of New York, to dismiss the appeal as moot is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 86-0848-CIV-Ryskamp

HOLYWELL CORPORATION, and THEODORE B. GOULD,
Debtor/Appellants,
v.
THE BANK OF NEW YORK AND FRED STANTON SMITH,
AS LIQUIDATING TRUSTEE,
Appellees.

ORDER AFFIRMING DECISION OF
THE BANKRUPTCY COURT

[Filed Feb. 20, 1987]

THIS CAUSE is before the court on appeal from a final order entered by the United States Bankruptcy Court for the Southern District of Florida.

I. *Parties and Facts*

The appellants are two of five debtors involved in chapter eleven bankruptcy proceedings in the bankruptcy court below.[1] These proceedings were apparently precipitated by the inadequate financing of a construction project called the "Miami Center Project", which the debtors had attempted to finance in part through a loan from the Bank of New York (hereinafter "Bank"). Ap-

---

[1] The three debtors that did not appeal are Miami Center Corporation, a wholly owned subsidiary of Holywell, Chopin Associates, a partnership of which Theodore B. Gould and Miami Center Corporation are the sole general partners, and Miami Center Limited Partnership, a limited partnership with Gould and the Miami Center Corporation acting as general partners.

pellant and debtor, Theodore B. Gould (hereinafter "Gould"), is the sole stockholder and president of appellant/debtor Holywell Corporation (hereinafter "Holywell"), which is the parent company of Twin Development Corporation (hereinafter "Twin"). Gould is also the president and one of the directors of Twin.

On June 23, 1983, Holywell pledged, *inter alia*, Twin's stock to secure Holywell's guaranty of construction loans made to Holywell by the Bank. Approximately seven months later, Holywell and the other debtors defaulted on their obligations to the Bank resulting in the filing of bankruptcy petitions by the debtors. The debtors default entitled the Bank to the unfettered right to plenary ownership of Twin's stock. Thereafter, on October 1, 1984, Holywell and Gould moved the bankruptcy court to authorize and approve the sale of certain specified real and personal property owned by Twin and four limited partnerships, all of which are controlled by Gould and Holywell. The bankruptcy court entered an order approving and authorizing Holywell and Gould to consummate the sale of the "Washington properties".[2] Subsequently, the bankruptcy court directed Holywell to cause Twin to deposit into a segregated account, any funds payable to Twin from the sale of the Washington properties, and adjudged that the Bank had a first lien on the net proceeds owed Holywell, Gould, and Twin, from the sale of that property.

After the sale of the Washington properties, the bankruptcy court adopted the plan of reorganization submitted by the Bank. The Bank's plan consisted of the ap-

---

[2] The "Washington properties" refer to three office buildings located in the Washington, D.C., locality, which became a part of the assets of Twin, and four limited partnerships, all of which are owned by Gould and Holywell. Twin received its portion of the one hundred twelve million dollars in cash proceeds from the sale of the Washington properties, which sum is presently at issue on this appeal.

pointment of a liquidating trustee, who would be empowered to sell the Miami Center Project to the Bank, in lieu of the Bank's claims against the debtors. That plan was then affirmed on appeal by the district court in a thorough and detailed analysis by Judge Aronovitz (see case no. 85-3225-Civ-Aronovitz).

Finally, on January 28, 1986, the bankruptcy court entered an order granting the liquidating trustee, under the plan of reorganization, sole and complete authority over the Washington properties proceeds segregated in a bank account in Twin's name. This order was necessitated by Gould's contention that the liquidating trustee was without authority to effect the assets of Twin. From this order, Gould and Holywell appeal.

II. *Jurisdiction and Mootness*

The subject matter jurisdiction of this court has been invoked by the appellants pursuant to 28 U.S.C. § 158, which grants district courts of the United States jurisdiction to hear appeals from final orders of bankruptcy judges in cases brought under title eleven of the United States Code. At the threshold, the appellees urge this court to decline the exercise of jurisdiction over this appeal, for they contend this appeal is moot. The appellees stress two points relating to the mootness of this appeal: First, they contend that the appellant's neglect in procuring an order staying the implementation of the plan of reorganization, submitted by the Bank and accepted by the bankruptcy court, is fatal to this appeal; second, the appellees maintain that the plan of reorganization has been "substantially consummated", as that phrase is defined in 11 U.S.C. § 1101(2), and this appeal should be dismissed as moot, since the liquidating trustee's funds have been depleted.

Respecting the appellees first contention on mootness, this court is unwilling to apply a per se rule which demands that a party secure a stay of a bankruptcy order

to ensure its appealability. "Determinations of mootness . . . cannot be cabined by inflexible, formalistic rules, but instead require a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail". *In re AOV Industries, Inc., v. Hawley Fuel Coalmart, Inc.*, 792 F.2d 1140, 1147-48 (D.C. Cir. 1986). Accordingly, the inquiry on mootness should focus on the feasibility or impossibility of effective relief to the appellants, in light of the appellees assertion that the plan of reorganization has been consummated. Although it appears that the plan of reorganization has been implemented to a large extent, and the precise portion of Twin's proceeds from the sale of the Washington properties may not be identifiable from other funds in the debtors' estates, this court nevertheless concludes that effective relief is possible. This conclusion derives from the most recent report submitted by the liquidating trustee to the bankruptcy court indicating a surplus in excess of two million dollars in the debtors' estates. If this court were to conclude that the bankruptcy court erred in ordering that the liquidating trustee be entrusted with cusody of Twin's funds, it is clear that the power to effect the surplusage in the debtors' estates would lie within this court's discretion. Consequently, this court rules that the instant appeal is not moot, and the exercise of jurisdiction over this appeal pursuant to 28 U.S.C. § 158 is proper.

III. *Standard of Review*

Appellate review of the bankruptcy court's order granting the liquidating trustee complete custody of Twin's funds is guided by two standards. First, as to findings of fact made by the bankruptcy court, they shall be affirmed unless it is demonstrated that they are clearly erroneous. Bankruptcy Rule 8013. Contrarily, the resolution of legal issues by the court below are subject to *de novo* review by this court. *See In re Matter of Butkin Bros., Inc.*, 757 F.2d 1573 (5th Cir. 1985).

IV. *Equitable Estoppel*

This court is cognizant of the equitable nature of bankruptcy jurisdiction and the pervading invocation of equitable principles in the exercise thereof. *Marin v. England*, 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966). In the instant appeal, it appears that the doctrine of equitable estoppel, a widely used equity concept in bankruptcy, as well as in other areas of the law, should be imposed against the appellant in affirming the order of the bankruptcy court below.

Essentially, equitable estoppel is a legal proposition which precludes a litigant from adhering to a position that is inconsistent with, or contradicted by, his statements, affirmative conduct, or acquiescence. The touchstone of estoppel lies in concepts of fair play and justice, *see, e.g., Schatzman v. Department of Health and Rehabilitative Services (In re King Memorial Hospital)*, 19 Bankr. 885, 891 (Bankr. S.D. Fla. 1982), although its use is circumscribed to instances where certain technical requirements are present. Gould and Holywell have taken a position through their representations and conduct which contravenes both the legal stance they now assert on appeal and the one which they argued to the bankruptcy court. But prior to deciding estoppel is apposite based on fairness notions, the requirements of that doctrine must be closely examined.

The basic elements that must be established to properly invoke estoppel entail the following: "(1) words, acts, conduct, or acquiescence, causing another to believe in the existence of a certain state of things; (2) willfulness or negligence with regard to acts, conduct or acquiescence; and (3) detrimental reliance by the other party upon the state of things so indicated." *Dooley v. Weil (In re Matter of Garfinkle)*, 672 F.2d 1340, 1347 (11th Cir. 1982); *see also, Minerals & Chemicals Philipp Corp. v. Milwhite Co.*, 414 F.2d 428 (5th Cir. 1969).

It is ineluctably clear that the first formal element of estoppel is present in the instant appeal. The appellants have repeatedly made representations to the effect of acknowledging that the proceeds from the Washington properties allocable to Twin would be available to creditors in satisfying claims against their estates in bankruptcy. For instance, Gould and Holywell represented to the bankruptcy court, the Bank, and numerous other creditors, that the sale of the Washington properties was

> in the best interest of the Debtors and of the creditors in these proceedings in that the immediate cash infusion from such sale[,] which inures to Holywell and Gould[,] [would] provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings.

Debtor/Appellants' brief, pg. 3.

Further, prior to the adoption of a reorganization plan by the bankruptcy court, Holywell and Gould submitted disclosure statements and proposed a plan of reorganization. The Holywell disclosure statement made manifest to the court and creditors alike, including the Bank, that the cash proceeds derived from the sale of the Washington properties apportionable to Twin would serve as a source of funds for creditors' claims (see record, No. 466, pg. 4). Additionally, the appellants filed certificates with the bankruptcy court relating to their proposed plans of reorganization, revealing that funds in excess of fourteen million dollars, including Twin's proceeds from the Washington properties located in a segregated bank account, would be assessable to quench claims of creditors. Indeed, Gould even testified in bankruptcy court that the Twin proceeds "had to go to Holywell as dividends", thus suggesting those funds would be appropriate for the satisfaction of creditors' claims (see record, No. 385h, pgs. 49-50).

In addition to these express representations, Gould and Holywell acquiesced in the Bank's justifiable presumption

that Twin's proceeds from the Washington properties would be included within the debtors' estates. For example, the bankruptcy court directed Holywell to deposit into a segregated account any net funds payable to Twin from the sale of the Washington properties. Neither Gould nor Holywell appealed this order by the bankruptcy court, but rather tacitly accepted the order of the court. Moreover, after the Bank moved for a determination that all funds, including the Twin proceeds, were cash collateral subject to the Bank's lien, the bankruptcy court ordered that the proceeds constituted "cash collateral as defined in § 363 of the Bankruptcy Code" (see debtor/appellant brief, pg. 79). Neither Gould nor Holywell took appeal from this order.

Subsequently, the Bank filed its proposed plan of reorganization, which directed that the proceeds from the Washington properties attributable to Twin be incorporated with funds in the Miami Center Liquidatng Trust and serve as a font for permissible claims against the debtors' estates. The appellants did not enter any objections to the Bank's plan, and after the bankruptcy court approved the Bank's plan, they did not raise the issue presently at bar on appeal.

In totality, the express statements made by Gould and Holywell, amalgamated with their conduct and acquiescence respecting the availability of Twin's proceeds from the sale of the Washington properties, results in the conclusion that their representations caused the Bank to believe in, and rely on, the existence of a certain state of things: namely, that the Twin funds could be applied to creditors' claims against the liquidation fund established by the bankruptcy court. Accordingly, the first element of estoppel is satisfied.

The second element of estoppel requires a finding that the party against whom the doctrine is imposed acted willfully or negligently with regard to their statements, acts,

and acquiescence. *Dooley*, 672 F.2d at 1347. There can be no doubt that Hollywell and Gould were, at the very least, negligent in not informing the Bank prior to this motion before the bankruptcy court that it did not intend to allow Twin's proceeds to be applied to creditors' claims. In point of fact, there is a strong inference stemming from Holywell's disclosure statement, the appellants' proposed plan of reorganization, Gould and Holywell's statement that the sale of the Washington properties would be beneficial to creditors, and Gould's testimony, that the actions of Gould and Hollywell were willful. In any event, it seems indisputable that Gould and Holywell failed to conduct themselves in a reasonable manner; by neglecting to object to the numerous orders of the bankruptcy court establishing the propriety of applying Twin's proceeds to creditors' claims, and by concealing from the Bank their true intention to thwart such a use of the proceeds if at all legally possible, the appellants evidenced the requisite intent under equitable estoppel.

The third element of estoppel engages the court in an inquiry whether the party to whom representations have been made detrimentally relied upon the state of things as indicated by the representer. *Dooley*, 672 F.2d at 1347. For this element to be met, the Bank must have detrimentally relied on the appellants' representations and conduct. The appellants' statement that the sale of the Washington properties would accrue to the ultimate benefit of creditors, by providing a cash infusion to the debtors' estates, was relied upon by the Bank in deciding not to object to the sale of the Washington properties. Likewise, the Bank relied on Holywell's disclosure statement, the appellants' failure to complain about the Bank's plan of reorganization and the order adopting that plan, the appellants' failure to appeal an order clarifying that the Twin proceeds could be used by the liquidating trustees, and Gould's testimony, all of which suggested expressly or implicitly that Twin's share of the proceeds from the

sale of the Washington properties was available for payment to creditors.

Moreover, the Bank acted upon these statements and the appellants' conduct by distributing a large segment of Twin's funds to creditors. To countenance the legal position assumed by the appellants would cause great detriment to the Bank. The Bank would likely be held responsible for reacquiring any funds paid out of Twin's funds. The Bank's detrimental reliance upon the conduct of the appellants is therefore most patently illustrated by its authorization and distribution of Twin's funds to creditors.

V. *Conclusion*

Consequently, this court is certain that the imposition of equitable estoppel against the appellants is dictated by precepts of equity, justice and fair play, and accords with the technical elements established in *Dooley*. Gould and Holywell have taken a posture which is surely inconsistent with their express statements and conduct, which led the Bank to distribute the Twin proceeds; the Bank's detrimental reliance on the appellants' representations leads this court to the inexorable conclusion that the appellants cannot maintain their position in this court of law.

In affirming the decision of the bankruptcy court on equitable estoppel grounds, this court pretermitted any discussion of substantive consolidation. However, it is apparent to this court that the reorganization plan of the bankruptcy court did not "substantively consolidate" Twin within the meaning of that term in § 105 of the Bankruptcy Code; Twin's assets and liabilities, with the exception of the proceeds from the sale of the Washington properties, remained wholly intact under the plan of reorganization. Furthermore, assuming substantive consolidation of Twin did occur under the plan adopted by the bankruptcy court, the factors enumerated in *In re Donut Queen Ltd.*, 41 Bankr. 706, 709 (Bankr. E.D.N.Y. 1984),

would militate in favor of upholding such action by the bankruptcy court.

Therefore, after careful review and consideration of the record and the court being fully advised in the premises it is hereby;

ORDERED and ADJUDGED that the appeal from the final order of the bankruptcy court granting the liquidating trustee complete control over Twin's proceeds arising from the sale of the Washington properties is affirmed.

DONE and ORDERED at the United States District Court, Miami, Florida this 20 day of February, 1987.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
United States District Court

copies furnished to:
all counsel of record

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al*,
Debtors.

ORDER ON EMERGENCY MOTION FOR CLARIFICATION AND LIQIDATING TRUSTEE'S RESPONSE THERETO

Theodore B. Gould moved this Court on an emergency basis for clarification as to the status of ownership and control of two United States Treasury Bills held in the Twin Development Corporation account No. 0002842207 at Florida National Bank of Miami, having a par value of $13,949,000.

Fred Stanton Smith, Liquidating Trustee made reply to said Emergency Motion and further moved this Court to enter its order to show cause directed to Theodore B. Gould as to why he should not be cited to the United States District Court for the Southern District of Florida for contempt.

The Court set the matter for hearing on short notice, and having heard argument of counsel for Mr. Gould

and the Liquidating Trustee, and in accordance with the observations made by this Court during said hearing, and the Court being fully advised in the premises, it is hereby

ORDERED that Fred Stanton Smith, Liquidating Trustee of the Miami Center Liquidating Trust, is the sole and only party under the orders of this Court, to the exclusion of all others, that may direct the Florida Bank of Miami, its officers, agents and servants, to encash the United States Treasury Bills in account No. 0002842207, which account is in the name of Twin Development Corporation, and to distribute the proceeds of said encashment in accordance with the Amended Consolidated Plan of Reorganization, as Amended, confirmed by this Court on August 8, 1985. It is further

ORDERED that the Liquidating Trustee's application for an order to show cause directed to Theodore B. Gould as to why he should not be cited to the United States District Court for the Southern District of Florida for contempt, be and the same is hereby denied.

DONE and ORDERED at Miami, Florida, this 28th day of January, 1986.

/s/ Thomas C. Britton
United States Bankruptcy Judge

Copies furnished to

Fred H. Kent, Jr., Esq.
Irving M. Wolff, Esq.
Fred Stanton Smith, Liquidating Trustee
Florida National Bank of Miami

APPENDIX E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Cases Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings in Chapter 11

IN RE HOLYWELL CORPORATION, *et al.*,
Debtors

ORDER RESPECTING FUNDS RECEIVED BY THEODORE B. GOULD, HOLYWELL CORPORATION AND RELATED ENTITIES IN CONNECTION WITH THE SALE OF CERTAIN REAL AND PERSONAL PROPERTY PURSUANT TO A PURCHASE AGREEMENT DATED AS OF JULY 26, 1984, AS AMENDED, TO BE DEPOSITED INTO A SEGREGATED ACCOUNT

Upon the Motion of The Bank of New York (the "Bank") for an order to require Theodore B. Gould, ("Gould") and/or Holywell Corporation, ("Holywell") to cause all funds received by related entities in connection with the sale of certain real property pursuant to a Purchase Agreement dated as of July 26, 1984, as amended, to be deposited into a segregated account; the Court having heard and considered the said Motion on December 10, 1984, upon notice to parties in interest and

counsel of record; good cause having been shown, it is ordered as follows:

1. Holywell shall cause Twin Development Corp. ("Twin"), a wholly owned subsidiary of Holywell, to deposit into a segregated account, subject to further order of this Court, any net funds payable to Twin from the sale of certain improved real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended August 26, 1984, between Hadid Investment Group, Inc., as purchaser and Twin, 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Eleven Dupont Circle Associates and Dupont Land Associates as sellers (the "Purchase Agreement").

2. Holywell shall cause to be deposited in such segregated account, subject to further order of this Court any net funds payable to the following wholly-owned subsidiaries of Holywell: Whitehall Security Corporation, Orion Cleaning Services, Inc., Orion Mechanical Services, Inc., Holywell Management Company, Holywell Management of Washington, Inc., HWL Corporation, Parkwell, Inc., CMI Corporation, NHA Corporation, PBA, Inc., as a result of the premature cancellation of the service contracts referred to in Exhibit H to the Purchase Agreement, or otherwise payable in connection with the sale of the Washington Properties, or any other entity in which Holywell, or Gould hold any interest of any nature whatsoever.

3. Holywell and Gould shall deposit all funds, including any beneficiary interest, into a segregated account, subject to further order of this Court including any and all funds payable to or by Gould, Holywell or to any other entity or entities which are owned (wholly or partially) or controlled (wholly or partially) by Holywell and/or Gould as a result of the sale of the Washington Properties. The funds shall not include the proceeds

payable to any independent person or entity in which neither Gould, Holywell, nor any related entity has any interest of any nature whatsoever.

4. Holywell and Gould shall cause all net funds payable into such segregated account pursuant to paragraphs 1, 2 and 3 above to be invested in accordance with § 345 of the Bankruptcy Code and subject to any claim of lien by Bank of New York and subject to further order of this Court. The interest on such funds may be used with prior approval of the court for operation of the Miami Center subject to the prior orders of court in regard to use of income. However the transfer and use shall not prejudice any security, lien or future claim by any creditor.

5. Holywell and Gould shall furnish the following to the Bank and to the Official Creditors' Committees of Gould and Holywell at least 5 days prior to the closing of the sale of the Washington Properties:

a) a copy of the propored closing argument;

b) a statement prepared by Touche Ross & Co. setting forth a detailed breakdown of the proposed payments and distributions to be made to Gould, Holywell, Twin, 1300 North 17th Street Associates, 1616 Remine Limited Partnership, 11 Dupont Circle Associates, Dupont Land Associates, and any other entity or entities owned or controlled (wholly or partially; and directly or indirectly) by Gould and/or Holywell; and

c) a sworn statement of Gould that neither, he nor any of the other debtors herein has any interest (whether direct or indirect) in any entity receiving funds set forth in the Touche Ross & Co. statement delivered pursuant to paragraph (b) above except as specifically set forth therein.

Done and Ordered this 11th day of December, 1984.

/s/ Thomas C. Britton
THOMAS C. BRITTON
United States Bankruptcy Judge

Copies furnished to:

All members of creditors' committees
Counsel of record
All parties on attached list

APPENDIX F

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Cases Nos.: 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings in Chapter 11

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors.

ORDER ON EMERGENCY MOTION TO TREAT PROCEEDS OF THE SALE AS CASH COLLATERAL, TO SEGREGATE AND ACCOUNT FOR CASH COLLATERAL

The Bank of New York ("BNY"), a secured creditor, moved this Court, pursuant to Bankruptcy Code § 363 and Bankruptcy Rules 4001 and 9014, for an order to compel the Debtors in these jointly administered Chapter 11 proceedings to deem the proceeds of the sale of certain real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended on August 28, 1984, between Hadid Investment Group as purchaser and Twin Development Corporation ("TDC"), 1300 North 17th Street Associates ("1300"), 1616 Reminc Limited Partnership ("1616"), Eleven Dupont Circle Associates ("Dupont Circle"), and Dupont Land Associates ("Dupont Land") as sellers (the "Purchase Agreement") as cash collateral.

The Court examined the memoranda which were filed both in support of and in opposition to the Motion of BNY, and having heard representation by the attorneys for Debtors, Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), as well as argument by the parties hereto, the Court finds as follows:

(a) This Court entered an Order on the 11th day of December, 1984, requiring that all of the beneficial interests of Gould and Holywell to the net proceeds from the sale of the Washington Properties are to be placed in a segregated, interest bearing account and held pursuant to further order of this Court.

(b) BNY appears to have a first lien on the interests of Holywell and Gould in the net proceeds from the sale of the Washington Properties, except for an amount of $264,669. Attorneys for the Creditors' Committees did not object to the claim of BNY at this hearing, although they have reserved the right to contest BNY's claim to a first lien at a future time if they desire to do so.

(c) Holywell provides administrative support for each of the selling entities, their partners, limited partners, and to the service companies which heretofore have been providing services to the Washington Properties. It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, their partners and limited partners are terminated and all obligations to the Internal Revenue Service are determined and paid.

(d) Holywell, after the sale of the Washington Properties, no longer will have any source of income except from the net proceeds of that sale and any interest it may receive from the investment of those net proceeds. Therefore, Holywell requires the use of a portion of the net proceeds of that sale in the immediate future to pay current, ordinary business expenses, including salaries, and will continue to require monies from either the net

proceeds of the sale or interest income from the investment of those proceeds until such time as Holywell can wind up the affairs of those selling entities.

(e) BNY has agreed to the use of the proceeds of the sale and/or interest for the expenses of Holywell subject to the prior approval by BNY of those expenses, and has agreed to an amount of $70,000 to be released immediately for the payment of December salaries payable on December 31, 1984, and other business expenses payable in January, 1985.

Upon consideration of the following, it is
ORDERED and ADJUDGED as follows:

1. This Court's Order of December 11, 1984 shall continue unchanged except as supplemented herein.

2. The net proceeds of the Washington sale constitute cash collateral as defined in § 363 of the Bankruptcy Code.

3. The Bank of New York has a first lien on all of the net proceeds due Gould and Holywell from the sale of the Washington properties, as well as the interest which shall accrue from the investment of those proceeds, except for an amount of $264,669. However, the Holywell and Gould Creditors' Committees or other creditors of Holywell and Gould, or the Debtors, may contest the lien of Bank of New York in subsequent, appropriate proceedings.

4. An amount of $70,000 shall be released immediately to Holywell to pay its salaries and other business expenses due on December 31, 1984 and during January 1985.

5. Holywell shall submit to the Bank of New York each month its anticipated expenses, including salaries, for the subsequent month. If the Bank of New York approves those expenses as submitted, they will be released without further order of this Court.

DONE and ORDERED in Miami, Florida this 31 day of December 1984.

/s/ Thomas C. Britton
THOMAS C. BRITTON
U.S. Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esq.
All Members of the Creditors' Committees
All Attorneys of Record
Service of this Order to be performed
by Fred H. Kent, Jr.

APPENDIX G

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 84-01590-BKC-TCB
through 84-01594-BKC-TCB

Chapter 11

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors

ORDER APPROVING AND AUTHORIZING HOLYWELL CORPORATION AND THEODORE B. GOULD TO CONSUMMATE THE SALE OF CERTAIN REAL ESTATE AND PERSONAL PROPERTY AND DIRECTING SEGREGATION OF NET PROCEEDS DUE HOLYWELL CORPORATION AND THEODORE B. GOULD

Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), debtors and debtors-in-possession, having moved this Court by motion dated September 28, 1984, for an order approving and authorizing Holywell and Gould to consummate the sale of certain real and personal property (the "Real and Personal Property") owned by Holywell and Gould as partners and stockholders in Twin Limited Partnership, Eleven DuPont Circle Associates and DuPont Land Associates "Sellers"); and due and timely notice of the hearing on the Motion having been given in accordance with Rule 2002 (i), Bankruptcy Rules, pursuant to an Order of this

Court dated October 1, 1984; and a hearing having been held before me on Octiber 22, 1984, to consider the Motion; and after hearing counsel for Holywell and Gould in support of the Motion and counsel for those parties who filed objections herein in opposition thereto; and upon the record and minutes taken before me at the hearing; and after due deliberation and sufficient cause appearing therefor; it is

NOW, on motion of Kent, Watts, Durden, Kent, Nichols & Mickler, attorneys for Holywell and Gould,

ORDERED AND ADJUDGED, that:

1. Holywell and Gould be, and they hereby are, authorized and empowered to consummate the sale of the Real and Personal Property to Hadid Investment Group, Inc., and/or assigns ("Hadid"), pursuant to the "Purchase Ageement" dated July 26, 1984, as amended by "First Amendment to Purchase Agreement" dated August 28, 1984, between Sellers and Hadid, a copy of each of which is annexed to the Motion:

2. Holywell and Gould be, and they hereby are, authorized and empowered to execute such documents and perform such other acts as may be necessary to consummate the sale as contemplated by the Purchase Agreement and the First Amendment to Purchase Agreement, including, but not limited to, the execution of any other agreements consistent with and in furtherance of such sale;

3. Holywell and Gould be, and they hereby are, directed to segregate the share of the net proceeds due Holywell and Gould from the sale of the Real and Personal Property approved by this Order and to invest such proceeds in accordance with § 345 of the Bankruptcy Code and hold same subject to further order of this Court.

DONE AND ORDERED at Miami, Florida, this 22 day of October, 1984.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

cc: All Members of all
Creditor's Committees
All Attorneys of Record
All Secured Creditors

APPENDIX H

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtor(s).

CONFIRMATION ORDER

These five chapter 11 debtors are owned, controlled and dominated by the individual debtor, Theodore B. Gould. On February 15, the debtors filed separate, but identical plans. Eleven days later, the Bank of New York, the major creditor whose claim is undersecured and hopelessly in default, filed an alternative plan. The competing plans were submitted simultaneously to the creditors for their separate acceptance or rejection and a joint confirmation hearing was held on April 29. Although conventional wisdom under the previous Act has been that creditors cannot be relied upon to understand and vote upon more than one plan at a time, the simultaneous submission of competing plans is clearly authorized. 11 U.S.C. § 1129(c); B. R. 3018(c). I am convinced that the risk of confusion was acceptable in this instance.

All parties are agreed that the debtors' assets, principally a major office building and luxury hotel in downtown Miami must be liquidated and the sooner the better. The bank's plan rests upon a firm commitment by the bank to purchase the property for $255.6 million. The

debtors' plans are based upon a "contract" to sell the property to an individual, Hadid, for a substantially higher price. However, there is no binding commitment from Hadid, who in effect has an option for which he paid nothing. The debtors have been in this court for nearly a year and have, so far, been unable to produce a firm contract at any price.

The competing plans differ significantly in their respective classification and treatment of creditors.

Because of the continuing and rapid escalation of the debtors' debt, this case could not tolerate the delay which would be caused by a separate and consecutive consideration of these competing proposals. In retrospect, there has been no indication that the creditors were befuddled by the simultaneous submission of the alternative plans.

By an overwhelming margin, the creditors (measured by the dollar amount of their claims) have demonstrated a preference for the bank's plan. The percentage of creditors who voted to *reject* each plan with respect to each of the five debtors was as follows:

	Debtors' Plans		BONY Plan	
Holywell	97%	Rejection	15%	Rejection
MCLP	80%	"	10%	"
MC Corp.	99%	"	10%	"
Chopin	99%	"	0.1%	"
Gould	80%	"	12%	"

Each of the creditors' committees have elected to support the bank's plan.

The substantial sums involved coupled with the simultaneous consideration of competing plans have resulted in spirited litigation between the two camps on a number of issues. The circumstances do not require and time simply does not permit a review and discussion of all these issues in this order. If this court had permitted the attorneys to do so, the charges, countercharges, law suits,

briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The principal support for the debtors' plans and, therefore, the major attack on the bank's plan comes from Gould and Olympia & York Florida Equity Corp. O. & Y. leased virtually all the furniture, fixtures and equipment required for the two large buildings. It has never received any payment. The bank has contended that the leases were not "true leases" but instead were unperfected financing agreements. By a judgment entered in and adversary proceeding on July 17, 1985, I rejected the bank's contention and agreed with O. & Y. The bank has appealed that decision and has filed a Second Amendment to Plan (C. P. No. 854) by which it in effect guarantees payment in full of the O. & Y. claim of $14.4 million, if the bank is unable to obtain a reversal of my decision.

The bank's plan subordinates the O. & Y. claim to the payment of all other unaffiliated creditors. By this order, I am approving that classification. O. & Y. will surely seek review. The bank's Second Amendment to its plan assures the funding necessary to pay the claim in the event my decision with respect to subordination is reversed.

The remaining issues between the bank, on the one hand, and O. & Y. and the debtor MCLP (of which O. & Y. is, with Gould, a joint general partner) do not merit further elaboration here.

The debtors' major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this

issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

Gould's other major criticism of the bank's plan is its provision for a modified form of substantive consolidation proposed by the plan and approved by me in an order entered on July 23. (C.P. No. 840). There is a pending application for rehearing and reconsideration of that order. No new points are raised and rehearing is denied. The issue was aired at great lengths and no purpose would be served by a repetiiton here of the analysis and comments made by the court, on the record at the end of that hearing.

Gould's remaining contentions do not, I think, require discussion.

During the confirmation process, the bank entered into a stipulation with a creditors' committee on April 29. (C. P. No. 614). There was an addendum to that stipulation on the same day. (C. P. No. 564). A second addendum was agreed upon an May 30 (C. P. No. 709(c)), and a third addendum was agreed upon on July 30. (C. P. No. 855) That stipulation as modified is approved.

I find that the Amended Plan (C. P. No. 478) filed March 26 by the Bank of New York as modified by the Second Amendment (C. P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C. P. No. 546) the cram down provisions of § 1129(b)(1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under,

and has not accepted, the bank's plan. That plan, as amended, is confirmed.

The several plans filed by the debtors do not meet the foregoing statutory requirements. They have been rejected by the creditors and confirmation is denied with respect to each of the debtors' plans.

DONE and ORDERED at Miami, Florida, this 8th day of August, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esquire
John Kozyak, Esquire
Scott D. Sheftall, Esquire
Irving Wolff, Esquire
Thomas F. Noone, Esquire
Joel Aresty, Esquire
All Committees
Vance Salter, Esquire
All creditors

APPENDIX I

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

ORDER APPOINTING TRUSTEE

On August 8, 1985 the Court entered an order confirming the Amended Consolidated Plan of Reorganization proposed by The Bank of New York (the "Bank's Plan"). Article V of the Plan contemplates the establishment of a liquidating trust and the appointment of a Trustee for all property of the debtors.

The Bank of New York has nominated Fred Stanton Smith to serve as Trustee under the Bank's Plan. In accordance with the discussions among counsel in open Court on August 8, Mr. Smith has been introduced to counsel for the debtors and Olympia & York.

In the interest of assuring an orderly transition from the debtors-in-possession to the Trustee, it is hereby ORDERED that:

1. Fred Stanton Smith is hereby appointed as Trustee for purposes of the Bank's Plan.

2. Since motions for rehearing are anticipated and will not be heard until next month, for the time being:

(a) the Trustee's compensation and expenses shall be borne by the Bank;

(b) The Trustee shall not assume title to, and possession and control of the debtors' property and affairs as contemplated by the Bank's Plan until such time, if any, as the motions for rehearing on the confirmation order have been heard and determined; in the interim, the Trustee and his representatives shall have the power and right:

(1) Upon notice to the debtors-in-possession, to enter upon and inspect the debtors' premises in order to become familiar with debtors' operations, including, without limitation, the Miami Center buildings and operations;

(2) Review and copy all books and records of the debtors and their respective subsidiaries, including all records, relating to receipts and disbursements, all bank statements, checkbooks, ledgers, and other financial data;

(3) Discuss the affairs and business operations of the debtors and their respective subsidiaries with the officers, directors, employees, attorneys, accountants, agents, tenants, subtenants, of such entities in order to gain a thorough understanding of such affairs and operations; and

(4) Engage attorneys, accountants, and such further consultants as he may deem appropriate, providing notice of such retention to parties in interest, for the purpose of analyzing the legal rights and financial position of the debtors and their respective subsidiaries.

3. On or before the date the Trustee assumes possession and control of the debtors' property and affairs pursuant to the Plan, the Trustee shall:

(a) File with the Court and serve upon all parties in interest a written statement describing the proposed basis

for his compensation as Trustee and the identity of, and proposed compensation for, such attorneys, accountants, and consultants as have been retained by him. No compensation shall be payable to the Trustee or to any such attorney, accountant, or consultant from the assets of the debtors' estates until the Court has reviewed and heard any objections to such proposed compensation arrangements.

(b) Post a Trustee's bond in the amount of $1,000,000.00 in form approved by the Court. All payments of claims by the Trustee shall be approved by Court order.

DONE AND ORDERED at Miami, Florida, this 12 day of August, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

cc: Counsel and Parties per
Attached Service List

APPENDIX J

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adv. No. 87-0627-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES and THEODORE B. GOULD

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL CORPORATION and THEODORE B. GOULD,

Defendants.

FINAL JUDGMENT

In conformity with the Findings of Fact and Conclusions of Law of even date, it is hereby

ORDERED AND ADJUDGED that the liquidating trustee of the Miami Center Liquidating Trust is not responsible for filing federal income tax returns on behalf of the debtors or liable to the United States of America for federal income taxes, if any, due on gain realized from the sale of real estate in Washington or from the sale of the Miami Center in Miami, Florida.

DONE AND ORDERED at Miami, Florida, this 28th day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

copies to:

Herbert Stettin, Esq.
Attorney for Trustee
1 Southeast 3rd Avenue
Suite 2215
Miami, FL 33131

Frank DeLeon, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044

Robert A. Mark, Esq.
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
Attorney for Debtor
Museum Tower, Suite 2200
150 West Flagler Street
Miami, FL 33130

Theodore B. Gould
Pro Se
2564-B Ivy Road
Charlottesville, Va. 22901

Vance Salter, Esq.
Coll Davidson Carter Smith
Salter & Barkett, P.A.
Attorney for Bank of New York
3200 Miami Center
100 Chopin Plaza
Miami, FL 33131

S. Harvey Ziegler, Esq.
Attorney for Bank of New York
2000 Miami Center
100 Chopin Plaza
Miami, FL 33131

Robert Musselman, Esq.
413 Seventh Street, N.E.
P.O. Box 254
Charlottesville, Va. 22902

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW
Adv. No. 87-0627-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES and THEODORE B. GOULD

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL CORPORATION and THEODORE B. GOULD.

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on before the Court upon the Complaint of the liquidating trustee of the Miami Center Liquidating Trust (the "trust") against the United

States of America (the "government"), the Bank of New York (the "bank"), Theodore Gould ("Gould"), Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Holywell Corporation (the "debtors") for a declaration of the responsibility of the trust to file and/or pay federal income taxes to the government upon gain realized from the sale of real estate and the Court having heard the testimony, examined the evidence presented, observed the candor and demeanor of the witnesses, considered the arguments of counsel and being otherwise fully advised in the premises does hereby make the following Findings of Facts and Conclusions of Law:

The facts are not in serious dispute. The debtors filed voluntary chapter 11 petitions on August 22, 1984, and the cases were substantively consolidated for all purposes. Shortly after the commencement of the chapter 11 proceedings, the debtors moved the Court for an order authorizing consummation of a prepetition contract for the sale of real estate in Washington (the "Washington properties"). Pursuant to order of this Court, the sale closed in December, 1984 and January, 1985, with the net proceeds due to Gould, Holywell, and Twin Development Corporation, a wholly owned non-filed subsidiary of Holywell, being placed in controlled accounts. The Court determined the proceeds of the sale were subject to the bank's lien, and entered a cash collateral order.

Thereafter, both the debtors and the bank proposed plans of reorganization which utilized the proceeds from the preconfirmation sale of the Washington properties and the post-confirmation sale of another parcel of real estate (the "Miami Center") as the sources of funds for payment of creditors. However, neither plan expressly provided for the payment of federal income taxes, if any, due on gain realized from those sales. The bank's Amended Consolidated Plan of Reorganization (the "plan") was confirmed on August 8, 1985, and became

effective on October 10, 1985, after the debtors failed to supersede the order of confirmation. The confirmation order was affirmed by the district court, 59 Bankr. 340 (S.D. Fla. 1986), and the 11th Circuit Court of Appeals dismissed an appeal of the order as moot because the plan was substantially consummated. *Miami Center Limited Partnership v. Bank of New York*, Nos. 86-5286, 86-5386 (11th Cir. March 10, 1988).

The confirmed plan creates a trust and requires that a liquidating trustee be appointed whose responsibilities include the identification and payment of all valid claims against the estate with the payment of the sum remaining to the debtors. The trust corpus consists of all the debtors' 11 U.S.C. Section 541(a) defined assets (including the stock of all the wholly-owned subsidiaries), and the Washington proceeds. Soon after the liquidating trustee took control of the trust, he sold the Miami Center to the bank's nominee and the proceeds became a part of the trust corpus.

The government was listed as a creditor. It was involved in other tax disputes with the debtors and had notice of the bankruptcy proceedings. The government received copies of the competing plans and disclosure statements; had an opportunity to object and be heard on the terms proposed in the plans; and to appeal from the order of confirmation which contained no provision for payment of capital gain taxes. The government did none of these things.

As conceded by the government and the debtors, the trust is not a separate taxable entity. However, the government and the debtors argue that the trust is responsible for filing an income tax return on behalf of the debtors and to pay the tax due, pursuant to 26 U.S.C. §§ 6012(b)(3), (b)(4), and 6151. The government supports this position by arguing that the liquidating trustee is a "trustee in a case under title 11 of the United

States Code, or assignee . . .," under 26 U.S.C. § 6012 (b)(3), thereby subjecting the trust to liability for taxes. The government also argues that the trust is responsible for taxes under 26 U.S.C. § 6012(b)(4) because it is "a trust, or an estate of an individual under Chapter 7 or title 11 of the United States Code [and payment] should be made by the fiduciary thereof." 26 U.S.C. § 6012(b)(4) (bracketed material added). Both the government and the debtors principally rely upon *In the Matter of I. J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974) to support their argument that the trust is responsible for these taxes.

The liquidating trustee argues that 26 U.S.C. § 6012 (b)(3), (b)(4) and *I. J. Knight*, 501 F.2d 62 are not applicable because the liquidating trustee in the case *sub judice* is not a trustee in a case under title 11 of the United States Code. The liquidating trustee also argues that 26 U.S.C. §§ 6012(b)(3) and (b)(4) are not applicable because the trust is a grantor trust, as defined under Subpart E of Subchapter J of the Internal Revenue Code, 26 U.S.C. §§ 671-69 and as such the trust is not a taxable entity under the Internal Revenue Code. The liquidating trustee cites *In re Sonner*, 53 Bankr. 859 (Bankr. E.D. Va. 1985), as support for his position that the trust is a grantor trust and therefore not responsible for filing tax returns or paying federal income taxes due, if any, on the sale of either the Miami Center or the Washington properties.

The *I. J. Knight* court found that a non-operating trustee appointed under Title 11 of the Bankruptcy Code was "liable for payment of federal taxes on income generated during liquidation and distribution of the bankrupt estate" pursuant to 26 U.S.C. § 6012(b)(3). *I.J. Knight*, 501 F.2d at 62. The reliance on *I.J. Knight* by the debtors and the government is misplaced for the Court finds that the liquidating trustee is not a trustee appointed in a case under title 11. The liquidating trus-

tee was appointed by the court as part of a confirmed plan of reorganization and his actions are limited to the powers granted to him in the plan and the order of confirmation. The plan created the trust solely to pay the debtors' indebtedness in a manner specified by the plan. Once that function is served, the liquidating trustee and the trust will cease to exist. Therefore the Court finds that the liquidating trustee, being a creature of a contract, is a contract trustee.

It is well-settled that tax statutes are "not to be extended by implication beyond the clear import of the language used and, in case of doubt, are construed most strongly against the government." *Greyhound Corporation v. United States*, 495 F.2d 863 (9th Cir. 1974). The obvious reasoning for this rule of construction is that the power to tax is the power to destroy, and "Congress could very easily have manifested any other intent by a limiting or qualifying provision." *Frankel v. United States*, 192 F. Supp. 776 (D. Minn. 1961), affirmed, 302 F.2d 666 (8th Cir. 1962), cert. denied, 371 U.S. 903, 83 S.Ct. 209, 9 L.Ed.2d 165 (1962). Therefore the Court finds that the liquidating trustee is not liable for payment of federal taxes, if any are due, under 26 U.S.C. § 6012(b)(3) since by its language it applies only to a trustee in a case under title 11.

Furthermore, the Court finds that the liquidating trustee is not an assignee within the meaning of 26 U.S.C. § 6012(b)(3) or a fiduciary under 26 U.S.C. § 6012 (b)(4). The liquidating trustee's duties and powers under the plan are limited. The liquidating trustee does not possess discretionary authority as to the disposition of plan's assets. The liquidating trustee is merely charged with the responsibility of identifying, quantifying and paying allowed claims through the disbursement of the trust assets in accordance with the terms of the confirmed plan. The liquidating trustee's functions are more closely analogous to those of a disbursing agent

than to an assignee or a fiduciary and, as such, he is not subject to tax liability as provided in 26 U.S.C. §§ 6012(b)(3) or (b)(4). *See In re Alan Wood Steel Co.*, 7 Bankr. 697 (Bankr. E.D. Pa. 1980).

Additionally, there was no assignment of the debtors' properties except as provided in the plan. The plan does not provide for the trust to file tax returns reflecting the sale of the properties in question or for the trust to pay taxes on those sales. If Congress had intended to hold a disbursing agent or contract trustee liable to file a tax return and to pay taxes, it could have explicitly provided for this in 26 U.S.C. §§ 6012(b)(3) and (b)(4) or elsewhere in the International Revenue Code. *Alan Wood Steel*, 7 Bankr. at 700. This court lacks authority to extend 26 U.S.C. §§ 6012(b)(3) or (b)(4) beyond the clear import of their language. *See Greyhound Corp*, 495 F.2d 863 and *Alan Wood Steel*, 7 Bankr. 697.

The liquidating trustee and the trust are also not liable for any taxes that may be due and owing to the government because the trust is a grantor trust and, as such, it is not a taxable trust under the Internal Revenue Code. *See* Subpart E of Subchapter J, 26 U.S.C. §§ 671-79 and *Sonner*, 53 Bankr. 859. Under 26 U.S.C. §§ 671-79, a grantor who has retained specified powers exercisable without the approval or consent of an adverse party is considered the owner of the trust and is taxed individually. *United States v. Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex. 1983), *aff'd*, 761 F.2d 1056, 1060-61 (5th Cir. 1985). The retention of power is manifested by the grantor's or non-adverse party's ability to control the beneficial enjoyment of the corpus or the income therefrom, or to receive income from the trust. 26 U.S.C. § 675 and 677. An adverse party is defined as a party which has a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-exercise of its powers regarding the trust. 26 U.S.C.

§ 672(a). The liquidating trustee is not an adverse party under the Internal Revenue Code. 26 U.S.C. Section 672(a). *See also Buttorff*, 563 F. Supp. 450 and Treas. Reg. §§ 1.672(a)-(1a), (a)-1(b).

Pursuant to 26 U.S.C. § 677(a), the grantor of a trust is treated as the owner if the income of the trust is "or, in the discretion of the grantor or a non-adverse party, or both, may be" applied to discharge a legal obligation of the grantor. *Sonner*, 53 B.R. at 863; 26 U.S.C. § 677(a); Treas. Reg. § 1.677(a)-1(d). Here, the debtors are the grantors of the trust, pursuant to the confirmed plan. The debtors' property became the property of the bankruptcy estate upon the filing of the Chapter 11 petitions and that estate was transferred to the trust pursuant to the terms of the plan. The entirety of the trust—its corpus and any income earned therefrom—is required under the plan to be used to discharge the legal obligations of the debtors. Any remainder is required to be paid back to the discharged debtors.

Treas. Reg. § 1.677(a)-1(d) unequivocally states that a trust whose income is used to discharge a grantor's legal obligations is a grantor trust. Additionally, Treas. Reg. § 1.677(a)-1(d) specifies that if the grantor, or a non-adverse party may, in their discretion, use trust income to satisfy the grantor's legal obligations, the trust is a grantor trust. *See* Treas. Reg. § 1.677(a)-1(d) and 26 U.S.C. § 677(a).

For the trust to be considered a taxable entity, the trustee must have as one of his permitted powers discretion as to which of the grantor's legal obligations to satisfy. The liquidating trustee in this case has no such discretion. Under the plan and 11 U.S.C. § 1142(a) neither the liquidating trustee or the grantors/debtors possess the discretionary power to decide how to disburse the assets of the trust to satisfy the grantors/debtors' legal obligations. The confirmed plan delineates the exclusive method of disbursement to the creditors.

The *Sonner* case directly supports this analysis. In *Sonner*, the debtor's voluntary Chapter 11 proceeding resulted in a confirmed plan of reorganization which required the debtor to convey his interest in certain parcels of real estate to a creditors' trust. The creditors' trust provided for the liquidation of the real estate at specified prices for the benefit of the debtor's creditors, with any remainder to be conveyed back to the debtor. This is precisely what the confirmed plan in the instant case provided. Specifically, the creditors' trust in *Sonner* required the liquidating trustee to hold and distribute the proceeds from the sale of the debtor's real estate in accordance with the terms of the confirmed plan. Like the plan herein, the creditors' trust in *Sonner* did not provide for the payment of taxes. The issue in that case was "whether the creditors' trust is the entity responsible for the payment of tax resulting from the sale of the parcels of real estate." *Sonner*, 53 B.R. at 860. The *Sonner* court noted that the intent of the debtor and his creditors, as is the case herein, was to use the trust as a vehicle simply for the purpose of liquidating the properties to pay creditors, and to return any excess to the debtor.

The *Sonner* court held that the creditor's trust was not responsible for the payment of a capital gains tax resulting from the sale of property. 53 Bankr. at 866. The court held that the creditors trust was a grantor trust, as defined in Subchapter J of the Internal Revenue Code, and the grantor-debtor, as owner of the trust, was liable for the taxes. *Sonner*, 53 Bankr. at 866. The Court agrees with and therefore adopts the reasoning found in the *Sonner* case thereby finding that the liquidating trustee is not liable for payment of federal income taxes, if any, that were incurred by the sale of the Miami Center and the Washington properties since the trust is a grantor trust and a non-taxable entity under the Internal Revenue Code. *Sonner*, 52 Bankr. 859. *See also Stockton v.*

United States, 335 F. Supp. 984, 986 (C.D.Ca.1971) (where the purpose of the trust is to extinguish the grantor's indebtedness, the grantor is treated as the owner of the trust for income tax purposes and the trust is not considered a taxable entity).

For the Court to conclude otherwise would be inconsistent with the recent ruling by the Eleventh Circuit Court of Appeals in *Miami Center Limited Partnership v. Bank of New York*, Nos. 86-5286, 86-5386 (11th Cir. March 10, 1988). The payment of the federal taxes would, of necessity, be an impermissible modification of the confirmed plan. *See* 11 U.S.C. 1127(b); *In re Northampton Corp.*, 59 Bankr. 963, 968-69 (E.D. Pa. 1984); *In re Seminole Park & Fairgrounds, Inc.*, 505 F. 2d 1011, 1014 (5th Cir. 1974); *See in re Hayhall Trucking, Inc.*, 67 Bankr. 681,684 (Bankr.E.D.Mich. 1986); *See also Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697,701 (10th Cir. 1964); *In re At of Maine, Inc.*, 56 Bankr. 55, 57 (Bankr.D.Me. 1985); *In re Heatron*, 34 Bankr. 526 (Bankr.W.D.Mo. 1983).

As noted by the court in *Miami Center Limited Partnership* when dismissing the appeal, it is legally and practically impossible to unwind the confirmation of this plan or to otherwise restore the status quo. The Court will not allow a "piecemeal dismantling" of a reorganization plan. *See In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C.Cir. 1978). The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan, more than two and one-half years after its confirmation. A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis. Additionally, the creditors voted on the plan and received payments under the terms of the plan based upon good faith reliance induced, in part, by the inaction of the government. It is simply impracti-

cable, and may well nigh be impossible, to unwind the substantially consummated and confirmed plan.

In summary, the Court finds that the liquidating trustee is not responsible to file income tax returns or to pay income taxes, if any are due and owing, resulting from the sale of the Miami Center or the Washington properties.

A separate Final Judgment of even date has been entered in conformity herewith.

DATED at Miami, Florida, this 28th day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

copies to:

Herbert Stettin, Esq.
Attorney for Trustee
1 Southeast 3rd Avenue
Suite 2215
Miami, FL 33131

Frank DeLeon, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044

Robert A. Mark, Esq.
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
Attorney for Debtor
Museum Tower, Suite 2200
150 West Flagler Street
Miami, FL 33130

Theodore B. Gould
Pro Se
2564-B Ivy Road
Charlottesville, Va. 22901

Vance Salter, Esq.
Coll Davidson Carter Smith
Salter & Barkett, P.A.
Attorney for Bank of New York
3200 Miami Center
100 Chopin Plaza
Miami, FL 33131

S. Harvey Ziegler, Esq.
Attorney for Bank of New York
2000 Miami Center
100 Chopin Plaza
Miami, FL 33131

Robert Musselman, Esq.
413 Seventh Street, N.E.
P.O. Box 254
Charlottesville, Va. 22902

APPENDIX K

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

PROCEEDINGS IN CHAPTER 11

Case No: 84-01590-BKC-TCB
Case No: 84-01591-BKC-TCB
Case No: 84-01592-BKC-TCB
Case No: 84-01593-BKC-TCB
Case No: 84-01594-BKC-TCB

IN RE: MIAMI CENTER CORPORATION,
Debtor.

1200 Brickell Avenue,
Miami, Florida,
Monday, 9:48 a.m.,
February 11, 1985.

DEPOSITION OF THEODORE B. GOULD

taken on behalf of the Committee
of Unsecured Creditors of Miami
Center Limited Partnership

pursuant to Bankruptcy Rules 2004 and 9106

APPEARANCES:

HOLLAND & KNIGHT, by
IRVING M. WOLFF, ESQ., of counsel,

and

ROMA W. THEUS, II, ESQ., of counsel,
Attorneys for Committee of Unsecured Creditors of Miami Center Limited Partnership.

KENT, WATTS & DURDEN, by
FRED KENT, JR., ESQ., of counsel,
Attorneys for Debtor.

STEEL, HECTOR & DAVIS, by
FRANCIS L. CARTER, ESQ., of counsel,

and

MEYER, WEISS, ROSE, ARKIN,
SHAMPANIER, ZIEGLER & BARASH, by
S. HARVEY ZIEGLER, ESQ., of counsel,
Attorneys for Bank of New York.

BLANK, ROME, COMISKY & MCCAULEY, by
DAWN A. FINE, ESQ., of counsel,
Attorneys for Holywell Unsecured Creditors Committee.

RICHARD TOUBY, ESQ.,
Attorney for Touby Painting, Inc.

WITNESS

* * * *

[49] Q. Has Miami Center Limited Partnership taken down all of the money in conneciton with the Bank of New York loan?

A. There may be a few thousand dollars that have not been taken down.

Q. Whitehall Pest Control, Inc.?

A. It performs the services at this project.

Q. What does it do?

A. It controls pests.

Q. This is one of the totally owned subsidiaries of Holywell?

A. Right.

Q. It is not listed as a creditor.

A. It is a service that is provided under the management contract.

Q. With whom?

A. With Holywell.

Q. Twin Development Corporation?

A. It's a wholly-owned subsidiary of Holywell.

Q. What does it do?

A. It owned the general partnership in 1300 [50] North 17th Street.

Q. That had something to do with the Washington property?

A. It is one of the buildings in the Washington area.

Q. If one of those subsidiaries had some money coming out of that closing, that would have gone to Holywell?

A. It has to go to Holywell as dividends.

Q. It is part of that money that is in escrow?

A. It is not in escrow.

Q. It is.

A. It is in escrow?

Q. It is all in escrow. It better be.

MR. KENT: It has not been dividended to Holywell.

THE WITNESS: I didn't realize the court order was an escrow agreement.

BY MR. WOLFF:

Q. NHA Corporation?

A. NHA was a partially-owned subsidiary—I think it is two-thirds owned by Holywell Corporation, and it is a general partner of property that we owned in Washington, D.C. called 1333 New Hampshire Avenue.

* * * *

APPENDIX L

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Amendment V to the Constitution of the United States provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The relevant provisions of the Bankruptcy Reform Act of 1978 (11 U.S.C. Section 101 *et seq.**) are as follows:

SECTION 105 (11 U.S.C. § 105)

§ 105. Power of Court:

(a) the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

* * *

SECTION 1104 (11 U.S.C. § 1104)

§ 1104. Appointment of trustee or examiner.

(a) At any time after the commencement of the case but before confirmation of a plan, on request

---

* The Chapter 11 Proceedings below were initiated on August 22, 1984. The 1984 Amendments to the Bankruptcy Code, with certain exceptions including Section 105, were made effective as to cases filed on or after October 10, 1985. Therefore, the Bankruptcy Code Sections set out in this paragraph 4 are in the form applicable to this case.

of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interest of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

* * *

SECTION 1123 (11 U.S.C. § 1123)

§ 1123. Contents of plan.

(a) A plan shall—

* * *

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's execution, . . .

* * *

SECTION 1128 (11 U.S.C. § 1128)

§ 1128. Confirmation hearing.

(a) After notice, the court shall hold a hearing on confirmation of a plan.

(b) a party in interest may object to confirmation of a plan.

SECTION 1129 (11 U.S.C. § 1129)

§ 1129. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of the chapter.

(2) The proponent of the plan complies with the applicable provisions of this chapter.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

* * *

(7) With respect to each class—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such creditor's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

* * *

(10) At least one class of claims has accepted the plan, determined without including any acceptance of the plan by any insider holding a claim of such class.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

* * *

3. The relevant provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub. L. No. 98-353) are as follows:

a. 28 U.S.C. § 1334(d) provides:

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

* * *

4. Rule 52(a) of the Federal Rules of Civil Procedure provides:

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court

shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 59; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 51(b).

5. Rule 8(c) of the Federal Rules of Civil Procedure provides in relevant part:

> (c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel . . . and any other matter constituting an avoidance or affirmative defense. . . .